

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

S&P GLOBAL, INC. and STANDARD)
& POOR'S FINANCIAL SERVICES LLC,)
Plaintiffs,) C.A. No. 20-701-RGA
v.)
S&P DATA LLC, S&P DATA OHIO)
LLC, S&P DATA MICHIGAN LLC and)
S&P DATA NEW MEXICO LLC,)
Defendants.)

J. Caleb Boggs Courthouse
844 North King Street
Wilmington, Delaware

Monday, March 14, 2022
8:59 a.m.
Bench Trial

BEFORE: THE HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.

APPEARANCES:

SMITH KATZENSTEIN & JENKINS LLP
BY: JASON MILLER, ESQUIRE
BY: NEAL C. BELGAM, ESQUIRE

-and-

COWAN LIEBOWITZ & LATMAN
BY: RICHARD S. MANDEL, ESQUIRE
BY: JOELLE MILOV, ESQUIRE

For the Plaintiffs

1 APPEARANCES CONTINUED:

2 RICHARDS LAYTON & FINGER, P.A.
3 BY: STEVEN J. FINEMAN, ESQUIRE
4 BY: JASON J. RAWNSLEY, ESQUIRE
5 BY: JENNIFER SIEW, ESQUIRE

6 For the Defendants

7 *** PROCEEDINGS ***

8 DEPUTY CLERK: All rise. Court is now in
9 session. The Honorable Richard G. Andrews presiding.

10 THE COURT: Please be seated. Is the Plaintiff
11 ready?

12 MR. MILLER: Yes. Good morning, Your Honor.
13 Jason Miller from Smith, Katzenstein, and Jenkins on behalf
14 of Plaintiffs S&P Global Inc. and Standard & Poor's
15 Financial Services LLC, and with me today from my office
16 Neal Belgam.

17 MR. BELGAM: Good morning, Your Honor.

18 MR. MILLER: Also, Richard Mandel --

19 MR. MANDEL: Good morning, Your Honor.

20 MR. MILLER: And Joelle Milov from Cowan
21 Liebowitz and Latman.

22 MS. MILOV: Good morning, Your Honor.

23 MR. MILLER: And we also have Anna Linne,
24 general counsel for Plaintiffs.

25 THE COURT: All right. Thank you, Mr. Miller.

1 Defendant, you're ready?

2 MR. RAWNSLEY: We are, Your Honor. Good
3 morning. Jason Rawnsley from Richards, Layton, and Finger
4 for the S&P Data defendants. I'm joined today by my
5 colleague, Mr. Steven Fineman of Richards, Layton, and
6 Finger as well as by David Borts, who is the Chief
7 Technology Officer and Chief Operating Officer of S&P Data.

8 THE COURT: All right. So good. Welcome
9 everyone.

10 Mr. Mandel, I assume you're going to open here?

11 MR. MANDEL: Yes, Your Honor.

12 Good morning, Your Honor. I'm Richard Mandel of
13 Cowan, Liebowitz & Latman and together with Joelle Milov, we
14 will be presenting evidence during this trial on behalf of
15 the plaintiffs, S&P Global Inc. and Standard & Poor's
16 Financial Services.

17 Now, the plaintiffs bring this case to protect
18 one of their most valuable assets, its S&P brand against
19 trademark infringement and dilution resulting from
20 Defendants' use of the name S&P Data. The S&P brand has a
21 long and venerable history. Plaintiffs' rights in the S&P
22 mark trace back more than eight decades to a 1941 merger
23 between two financial publishers, Poor's Publishing Company
24 and Standard Statistics, and the S&P mark has been
25 continuously used since the merger to identify Plaintiffs'

1 financial information services.

2 Now, those services include providing business
3 data, analytics, research and commentary, credit ratings,
4 and financial indices, including most notably the S&P 500,
5 which is oftentimes referred to simply as the S&P.

6 The S&P 500 was formed back in the 1950s to
7 reflect a representation of the state of the U.S. stock
8 market, and it's become one of the most widely followed
9 equity indices in the world. The evidence will show that
10 it's familiar not just to financial professionals, but to
11 members of the general public, who see news reports about
12 the S&P every day and who also own investments in things
13 like mutual funds and ETFs that are branded under the S&P
14 trademark pursuant to licenses that Plaintiffs entered into.

15 The evidence will show that Plaintiffs own a
16 famous family of S&P marks, with the S&P house mark serving
17 as the common umbrella brand for all the services offered.
18 Now, that family has expanded over the years as Plaintiff
19 has introduced new marks, all of those marks beginning with
20 the S&P designation, which serves as the primary brand
21 identifier uniting the entire family. And most of those
22 other marks include descriptive-type wording after that that
23 may reflect various countries, or certain segments of the
24 market. Obviously, less important in terms of
25 identification from a branding point of view.

1 Now, the evidence will show that S&P owns many
2 registrations, federal registrations, for its S&P mark,
3 including the mark S&P itself, and that many of those
4 registrations, including the S&P mark alone, are
5 incontestable. The evidence will also show that Plaintiffs
6 own strong common law rights in the S&P marks by virtue of
7 continuous usage going back to the 1940s. So we submit
8 there will be no serious dispute as to priority in this
9 case.

10 The evidence will also leave no doubt as to the
11 strength of Plaintiffs' trademarks and that the S&P mark
12 will be found, we believe, by the evidence to come into the
13 strongest category of marks, famous marks that are entitled
14 to the broadest scope of protection under the trademark
15 laws.

16 You will hear testimony from Alice Cherry, a
17 marketing executive at S&P Global who will testify about the
18 extensive advertising and promotion of the S&P marks, the
19 billions of dollars in revenues that have been generated
20 from services sold under those marks, and the substantial
21 media coverage going back over a period of decades in
22 publications all across the country reflecting the
23 recognition of the S&P marks. You will also hear evidence
24 that Brand Finance, one of the leading brand valuation firms
25 in the world, valued the S&P brand at \$6 billion and ranked

1 it within the top ten strongest commercial service brands.

2 Now, as one would expect, given all these
3 typical hallmarks of fame, the evidence will show that the
4 S&P mark enjoys a high degree of recognition. And that's
5 reflected both in S&P's own internal market research, which
6 it conducts for its own business purposes, as well as in the
7 survey that's conducted for purposes of this litigation by
8 Plaintiffs' expert Hal Poret, showing a 67 percent
9 recognition rate among members of the general consuming
10 public.

11 Now, the defendants are going to bring in their
12 own expert, Dr. Chiagouris, and he's going to quibble with
13 some of the design decisions that Mr. Poret made, but
14 notably he's not going to offer any survey of his own,
15 either on fame, recognition or on the likelihood of
16 confusion factors, which he then plans to, apparently, opine
17 on.

18 And that's important because I think, Your
19 Honor, as you listen to the evidence and consider these
20 criticisms, you can also look at all the other evidence in
21 this case that really serves to substantiate Mr. Poret's
22 findings: the media coverage, S&P's own market research,
23 the sales revenues and advertising expenditures. It all
24 points in the same direction as Mr. Poret's survey, and that
25 is to show that the mark is highly recognized and is a

1 famous mark. And it's also supported by the internal
2 findings in the survey itself. As Mr. Poret will testify,
3 despite all of Dr. Chiagouris' criticisms, the results for
4 the other marks tested all fall in line exactly with what
5 one would expect them to be, so that the made-up, fictitious
6 name that served as kind of a control only generated one
7 percent recognition, showing that people actually understood
8 the question and weren't saying they recognized something
9 that they didn't. The very well-known names like Goldman
10 Sachs and NASDAQ achieved extremely high percentages, and
11 the less well-known actual financial names like FTSE got a
12 much, much lower level of recognition of about 15 percent.
13 That all tends to be very self authenticating, as Mr. Poret
14 will explain.

15 And as I turn to the likelihood of confusion
16 factors, which Dr. Chiagouris also will be opining on, I
17 want to highlight the actual evidence on those points and
18 how we believe it points overwhelmingly in favor of a
19 likelihood of confusion.

20 Now, as Your Honor knows, in the Third Circuit,
21 likelihood of confusion is governed by the Lapp Test, and
22 there are a number of factors to be balanced. And what the
23 Third Circuit has identified as the most important factor, a
24 real starting point in any trademark infringement case, is
25 the similarity of the marks. The evidence here will show

1 what is obviously, we think, simple common sense. The marks
2 are highly similar and confusingly similar. The S&P
3 portion, which is the dominant portion of both parties'
4 marks, is identical, and the evidence will show that
5 Defendants' use of the term "data" only serves to heighten
6 the similarity because that term is itself uniquely and
7 naturally associated with the plaintiffs. Everything that
8 they do, their whole business, the services, whether you're
9 talking about the indices or the credit ratings or the
10 analytics, is all driven by data. And we will offer
11 evidence showing that the term "S&P data" has actually
12 appeared in many news articles going back over a period of
13 decades with reference to the plaintiffs' business. So the
14 evidence will support that the term "S&P Data" would fit
15 quite naturally into the portfolio of Plaintiffs' S&P marks
16 that the public already identifies with the plaintiffs.

17 Now, another important factor is the strength of
18 the plaintiffs' mark, and, on that, we've already talked
19 about a lot of the evidence that will show that. Obviously,
20 the evidence that goes to the fame of those marks also
21 supports that they're strong marks. And while we expect
22 that the defendant may try to argue that that strength is
23 diminished by third party use, we'll ask the Court to pay
24 careful attention to what the evidence actually is on that
25 point because while we've heard a lot of talk from the

1 defendants' executives about the supposed large number of
2 third parties, we've seen, really, almost nothing in terms
3 of the kind of admissible proof that Courts look for in
4 trying to gauge the effect of that third party use, whether
5 it really had a marketplace impact, whether it's really
6 served to develop a significant scope of usage such that
7 it's weakened the plaintiffs' rights. And you will also
8 hear evidence from S&P's in-house counsel Anna Linne, who
9 will testify about the very significant enforcement efforts
10 that Plaintiffs have made and taken over the years to
11 protect their trademarks, including in some decisions in
12 Court cases that have actually referenced the fame of the
13 S&P marks.

14 Now, turning to the similarity of the parties'
15 services and the channels of trade, another factor under the
16 likelihood-of-confusion analysis, the evidence we'll here
17 will show that Defendants' call center and associated
18 business services are sufficiently related to Plaintiffs'
19 financial information services to create a likelihood of
20 confusion. And it's important to keep in mind here that
21 Defendants themselves position and identify their services
22 as really being more than a typical call center. They tried
23 to emphasize how they've become almost akin as a quasi sales
24 force for their clients and operate as part of the
25 infrastructure of that business, providing not only services

1 to support the business, but information and advice on how
2 to best position those -- their clients' services, how to
3 sell them more effectively, really using data and analytics
4 in a very similar fashion to the way Plaintiff does for its
5 customers.

6 The evidence will also show that the parties'
7 services are often offered to some of the same types of
8 customers in some of the same industries, including the
9 financial industry, and the evidence will show that there
10 have actually been several instances of actual confusion in
11 that industry among entities like Discover, SoFi, Wells
12 Fargo, and Key Bank, where individuals mistakenly believed
13 that S&P Data was part of Standard & Poor's.

14 The evidence will also show that both Plaintiffs
15 and Defendants operate their business in a B-to-B-to-C
16 structure. And what that means is while their direct
17 customers may tend to be large businesses, the services are
18 offered in such a way that the public itself interacts with
19 the parties' marks and is exposed to those marks on a
20 regular basis. In the case of Plaintiffs, that may be
21 individual investors who go to a financial website looking
22 for data that's licensed by the plaintiffs or who own
23 investments in ETF, or mutual funds that are licensed under
24 the S&P name. In the case of Defendants, that may be
25 individuals who are actually called by the defendants' sales

1 agent who's selling to them, and in at least some states,
2 the defendants actually have to identify themselves on those
3 calls as being from S&P Data. So there is another layer of
4 potential confusion in addition to the parties' direct
5 customers.

6 Now, turning to sophistication and the level of
7 care that the consumer is likely to exercise, we know that
8 defendants place a great deal of emphasis on this, and we
9 know we're going to hear a lot about that. And they're
10 going to say this isn't an impulse purchase, and we don't
11 dispute that. Nobody is claiming that somebody buys the
12 parties' services the way they buy a stick of gum or an item
13 at a checkout counter in line. It's not an impulse
14 purchase.

15 But at the same time, as I've already noted,
16 there is evidence of actual confusion even among these
17 sophisticated individuals. For example, you'll hear
18 evidence of the case of one person from SoFi who actually
19 went so far as to express interest in setting up an initial
20 immediate meeting with S&P Data about their services because
21 he thought they were part of Standard & Poor's. If those
22 people with that level of sophistication can be confused, we
23 submit anyone can be confused.

24 Now, we know that the defendants will try to
25 downplay this evidence and will suggest it's a limited

1 number of instances and that people eventually realize their
2 mistakes before culminating a transaction, but there is a
3 reason why trademark law considers evidence of actual
4 confusion so important. It's because it is notoriously
5 difficult to find, and it's why plaintiffs are not required
6 to prove actual confusion at all. They're only required to
7 show a likelihood of confusion. And we submit that for
8 every example of actual confusion that comes to light, there
9 are likely many more that never see the light of day and
10 that you never hear about. So the fact that we will be able
11 to show these examples of confusion is persuasive proof and
12 important evidence that a likelihood of confusion exists in
13 this case. And even if some of those individuals eventually
14 realize their mistake, even the initial interest they
15 express is relevant evidence of actionable confusion.

16 Now, the last factor I want to talk about in the
17 likelihood-of-confusion analysis is the defendants' intent.
18 And of course, it's not necessary that the defendant act in
19 bad faith for there to be an infringement. When looking at
20 intent, Your Honor can consider whether they exercised
21 adequate care in choosing the mark. And on that point, we
22 believe there is important evidence relating to an initial
23 dispute that took place in Canada with an earlier company
24 that Mr. Plashkes had formed that also used the name S&P
25 Data. Now, I want to talk a little bit about that evidence.

1 I know it was the subject of in limine motions, and I think
2 it's important to put it in context and see where it fits in
3 this case.

4 The evidence is going to show that whatever
5 Mr. Plashkes and Mr. Borts may say about that dispute, the
6 paper record makes absolutely clear that that dispute got
7 resolved when the company to whom Mr. Plashkes sold his
8 business decided to drop that name and abandon the trademark
9 applications in Canada that had been the subject of McGraw
10 Hill, Plaintiff's predecessor, their initial complaint.
11 That happened years after Mr. Borts and Mr. Plashkes had
12 long left the business and moved on, and they candidly
13 acknowledged at their depositions that the decision on what
14 to do with the S&P Data mark from that first dispute was a
15 decision that belonged to that company that had acquired the
16 rights. The only reason we're here today, that the
17 defendant is even in a position where it can have adopted
18 that mark, is because of that abandonment, because that
19 company to whom it sold the rights had moved on and away
20 from it for whatever reasons.

21 So if we're looking at that as an enforcement
22 matter, the evidence is going to make clear that it ended in
23 a successful resolution in McGraw Hill's favor, but what we
24 think is important about that evidence is it unquestionably
25 shows that Mr. Borts and Mr. Plashkes knew about the

1 plaintiffs' S&P mark, and any reasonable level of research
2 would have revealed that the dispute had existed after they
3 left and that the mark was eventually dropped by the
4 person -- the company to whom they sold the business after
5 continued complaints from McGraw Hill.

6 And while that dispute was about Canada, it
7 would not have taken much research or investigation to
8 recognize that McGraw Hill is hardly a Canadian company.
9 It's an American company, and its S&P marks are likely more
10 well known here in the United States. In fact, we submit
11 it's hard to really believe that sophisticated
12 businesspeople like Mr. Borts and Mr. Plashkes weren't well
13 aware of the S&P 500 and the S&P marks already. And we
14 believe a reasonable inference from the evidence is that
15 that is precisely the reason, when they eventually formed
16 the new business, the company that is actually in dispute
17 here and that's at issue in this case today, why for many
18 years they identified it as SP Data and not S&P Data.

19 Now, that evidence is important, and before I
20 explain why, so -- I just want to say, putting all of that
21 together, we think it will overwhelmingly support a
22 likelihood of confusion in this case. And a lot of that
23 same evidence, I'm not going to repeat it, also goes to the
24 issue of likelihood of dilution as well, which, as Your
25 Honor knows, can be found even in the absence of a

1 likelihood of confusion.

2 So, the last point I want to point to, and if I
3 can ask to just set up the demonstrative we have, I want to
4 talk a little bit about the evidence that's going to be
5 relevant to the issue of our request for injunctive relief
6 and Defendants' laches defense. And I raise those two
7 points together because they are interrelated. The fact
8 that we're here dealing with a claim only for injunctive
9 relief, not for damages, affects the laches analysis, and
10 under the case law, the Third Circuit has said in these
11 circumstances, to bar relief, you really need an outrageous
12 delay amounting to a virtual abandonment of the plaintiff's
13 right for relief, and we submit that that is not the case,
14 and part of the reason, despite Defendants' effort to talk
15 about how long they've been using, the claimed delay that
16 they talk about really has to be understood in context.

17 As I indicated, when you start in 2004 with the
18 formation of these businesses, they're clearly identifying
19 it publicly as SP Data Response Management, not S&P Data.
20 And that will be shown from authenticated website printouts
21 from Wayback Machine, which collects old internet pages and
22 shows that's the only name that appeared on the website,
23 really, for about a decade.

24 And even when they opened call centers in the
25 United States physically for the first time in, I believe,

1 around 2010 in Cleveland, you will see evidence that when
2 Mr. Plashkes gave an interview on local TV, he's identified
3 as the CEO of SP data, not S&P Data, and that name also
4 appears across the bottom of screen on a banner, CEO, SP
5 Data.

6 And that's not by accident. That's not just
7 that somebody made a mistake because there's lot of other
8 evidence that shows that the defendant was using that name
9 in their business, and Mr. Borts admitted that at his
10 deposition. And you will see, for example, that even the
11 employee handbook that was in use as late as 2012 at the
12 Ohio center repeatedly refers to the defendant as SP Data.

13 So it's really not until around 2014 that you
14 really start to see an S&P Data starting to be used more in
15 public-facing materials like on the website, which is really
16 the primary public-facing material. And you can see that on
17 our demonstrative in the first logo. It's almost -- the
18 ampersand is almost partially obscured. It kind of forms
19 part of the continuous loop with the S&P as part of it.
20 "Data" is in pretty big wording right next to it
21 immediately. When they moved to the final logo you see,
22 which is the logo that was in place at the time this lawsuit
23 was commenced and, I believe, was introduced in late 2016,
24 now you'll see the ampersand very clearly delineated, the
25 "S&P" in much larger size than the term "data," clearly

1 emphasizing it.

2 And that, the evidence will show, is part of a
3 deliberate rebranding effort. You will hear testimony,
4 deposition testimony, from Dean Harris, who is a branding
5 consultant who S&P Data actually hired to help them with the
6 website redesign and logo redesign that took place at this
7 time. And he will explain how his mission was to increase
8 the brand awareness of the S&P Data name. And one of the
9 very first things he did when he did an analysis of
10 strengths, weaknesses, opportunities, and threats, what's
11 called a SWOT analysis, is point out that the lack of brand
12 awareness in the United States was a real weakness for the
13 S&P Data brand, and he wanted to increase that. He actually
14 even went so far as to suggest that they drop the name
15 entirely and change to a different name, which is important
16 evidence because at that late juncture, it shows that there
17 was still very limited awareness that had actually been
18 established here in the United States.

19 And he also, then, developed a branding strategy
20 built around the call center that sells. For the first
21 time, they identified S&P as standing for sales and
22 performance. It was never promoted that way before. It was
23 never really promoted as standing for anything. The
24 evidence will show that it was initially adopted to reflect
25 the initials of the founders, Mr. Plashkes and Mr. Shear,

1 Mr. Shear was long gone from the business pretty soon after
2 the first business was formed. And it's not as if
3 Defendants were promoting S&P as standing for anything. And
4 when they started promoting it as standing for sales and
5 performance, that's an extremely broad promotion that ties
6 into the idea that we're not just a call center. We're
7 offering you services that you can really use to help run
8 your business and to identify better how to sell.

9 So, that's all important evidence, and it's
10 important because when Your Honor takes into account
11 injunctive relief and laches, which are equitable, you know
12 laches is an equitable defense, injunctive relief,
13 obviously, tries to reach the equitable result, Your Honor
14 can take into account all of the evidence that bears on the
15 equities here, and that will include the fact that Defendant
16 was historically known for a long period of time as SP Data.
17 It will include the fact that they established very limited
18 brand awareness in the U.S., that they -- their own CEO
19 acknowledged making pretty negligible efforts at marketing,
20 and that they were long aware for the potential of a
21 dispute, for this very dispute that we're here for today.
22 And what will also be part of the equation will be the need
23 to protect the public against confusion and also the need to
24 protect S&P's enormous investment in its S&P brand.

25 And when you've heard all of that evidence, Your

1 Honor, we submit that it will show that an injunction
2 against the continued use of the S&P Data name is
3 appropriate and necessary, and we will ask the Court to
4 enter that relief. Thank you.

5 THE COURT: Okay. Thank you, Mr. Mandel.

6 Mr. Rawnsley.

7 MR. RAWNSLEY: Good morning, Your Honor. We're
8 going to start by providing some background about S&P Data.

9 S&P Data is an onshore, outsourced contact
10 center. Contact center is a business function that handles
11 interactions between a company and its customers, whether by
12 way of customer inquiries or by way of handling
13 transactions. Now, this is a business function that many
14 companies choose to outsource, either wholly or partially or
15 even project-based, and that's where S&P Data comes in, and
16 those are the services that it provides.

17 S&P Data's clients are sophisticated companies.
18 They include ADP. They include Comcast. They include Wells
19 Fargo, and they include American Express. And many of its
20 customers are long-term and loyal and have been with it for
21 a very long time, some going back to the original
22 incarnation of S&P Data formed in Canada in 1986. Now,
23 while much of the contact center industry has been moved
24 offshore, S&P Data remains a North American company
25 primarily based throughout the United States and Canada.

1 S&P Data's clients know who they are dealing
2 with. They know who S&P Data are, and they know what they
3 are getting, and this is because of the way S&P Data markets
4 itself. S&P Data's sales presentations have traditionally
5 been performed by one of the three founders of the company.
6 They're often conducted in person. S&P Data relies on its
7 reputation and it relies on its excellence and its long-term
8 track record of customers to gain clients. You heard
9 Mr. Mandel state that Mr. Plashkes said we don't do much
10 marketing with the -- with the S&P Data name. And that's
11 correct. S&P Data has not done a lot of traditional
12 marketing because it does not do the kind of marketing that
13 Plaintiffs engage in.

14 Now, the evidence is going to show that the
15 costs of S&P Data's services range from tens of thousands to
16 millions or more per month. They're going to show that the
17 negotiation of a contract to hire Defendants takes months as
18 well. These are negotiations being conducted with the
19 clients the whole time. They're constantly speaking with
20 S&P Data. S&P Data, once it begins to provide its services,
21 it has to closely integrate with its customer's services.

22 Now, S&P Data is continuously in contact with
23 its clients throughout the work it provides for them. That
24 is the very nature of its business. Now, it's against this
25 backdrop that Plaintiffs have to prove likelihood of

1 confusion, likelihood of dilution. And the Court is going
2 to hear that Plaintiffs' services are similarly very
3 expensive. They range from the thousands up until the, into
4 the millions of dollars as well. They also are created on a
5 contract basis where negotiations can take from weeks up to
6 months, and Plaintiffs are -- their clients are about as
7 sophisticated as it gets. Their clients are sovereigns.
8 Their clients include educational institutions. Their
9 clients include investment banks, and they are selling to
10 the asset managers and to the financial analysts within
11 those clients.

12 Now, the services Plaintiffs offer are financial
13 information services. The Court is not going to hear any
14 evidence showing that that is in any way related or a
15 substitute for what S&P Data does. They are simply not in
16 the same market. They are not in the same business.

17 Now, Your Honor is going to hear from Mr. Dan
18 Plashkes, the CEO of S&P Data, and Mr. David Borts, who is
19 the Chief Operating Officer and Chief Technology Officer.
20 Mr. Plashkes is going to discuss how in 1986, he founded S&P
21 Data in Canada. He's going to explain that the "S&P" came
22 from the names of the initial founders, Mr. Michael Shear
23 and Mr. Plashkes. Similarly, Plaintiffs, who were
24 originally founded by Henry Varnum Poor, and they're also
25 deprecating the use of Standard and Poor's in favor of S&P.

1 Now, Mr. Plashkes and Mr. Borts are both going
2 to talk about the importance of data to S&P Data's
3 recognition among the clients that it serves. Data was
4 important in 1986 when they chose the name because data is
5 how S&P Data distinguishes itself from its competitors. It
6 has always been embracing technology. It has always been
7 trying to be ahead of its competitors, and it has always
8 been continuously monitoring and tracking the information
9 that it develops so that it can improve its own services.

10 Mr. Borts is going to explain how the company
11 used the phrase "SP Data" for a period of time alongside the
12 term "S&P Data." Domain names, when they refounded the
13 company, cannot include ampersands, and so, based on
14 previous experience with a previous domain name that they
15 had in 1986 and on, they, for a while, chose to use SP Data
16 in certain forms, but the Court is also going to see that
17 the S&P Data name was being used with clients within this
18 period. The Court is going to see evidence from newspapers
19 recognizing that S&P Data is also known as SP Data.

20 Now, Your Honor has just heard Plaintiffs also
21 allege number of instance of actual confusion, and there are
22 a few things to keep in mind as that evidence comes in.

23 First, the number of incidents has to be
24 considered against the number of interactions that S&P Data
25 engages in as it's providing services to its clients every

1 year. They make millions of calls per year. And the Court
2 is not going to hear any evidence of any actual confusion
3 arising from any one of those phone calls.

4 Second, the evidence is going to show that each
5 purported incident of actual confusion is ad hoc. They are
6 not systematic. Nothing connects one to the other. And the
7 important -- confusion is readily dispelled because of the
8 simple fact because the parties cannot provide the same
9 services. They do not, and they cannot. And without any
10 effect on the marketplace, this -- this evidence of actual
11 confusion, alleged actual confusion, the Third Circuit has
12 told us, carries less weight when there's not an effect on
13 the marketplace.

14 Now, here's some other things the plaintiff is
15 not going to be able to show. The plaintiffs have no expert
16 testimony on likelihood of confusion. The plaintiffs have
17 no expert testimony that shows blurring of the parties'
18 respective marks. The plaintiffs have no expert testimony
19 showing that the public recognizes any phrase as coming from
20 a single source as long as it's preceded by the name "S&P."

21 Now, Plaintiffs, we've heard, have conducted a
22 survey on recognition on the S&P name. Now, fame is the
23 gating issue for Plaintiffs' dilution claim. If there's no
24 fame, you don't get to the rest of the analysis. It stops.
25 And the Court is going to have to determine whether

1 Plaintiffs carried the burden to show that the S&P name was
2 famous among the general members of the consuming public as
3 a designation of goods and services not today, not when the
4 survey was conducted, but when S&P Data first began
5 commercial use of its mark, and the evidence is going to
6 show that that occurred in 2004.

7 Now, we heard about, in 2014, how Defendants
8 began using the name S&P Data regularly, and that's correct.
9 S&P Data around 2013 and 2014 did make an effort to have a
10 single focus in its branding and go to the public more often
11 as S&P Data. But in 2014, anyone looking at S&P Data's
12 website would know a few things. They would know that the
13 name was S&P Data. They would know that S&P Data had
14 clients who worked in the financial industry as well as
15 other industries. They would know that S&P Data, at that
16 time, was touting its innovative social media presence.

17 Now, it is in this year, 2014, that S&P Data
18 came to the attention of the plaintiffs, that we know of.
19 Now, Plaintiffs had access to S&P Data's website at that
20 time. It's not credible that they didn't look at it. But
21 when it came to their attention in 2014, Plaintiffs referred
22 the matter to their general counsel. The matter was
23 forwarded to Plaintiffs' outside trademark counsel at the
24 law firm of Proskauer Rose. Under Plaintiffs' direction,
25 Proskauer Rose retained a trademark investigation firm who

1 investigated S&P Data. And as a result of all this in 2014,
2 knowing that there was a company out there named S&P Data
3 that had clients in the financial service industry,
4 Plaintiffs did nothing as to S&P Data as a result of that in
5 2014. They did nothing in 2015, nothing in 2016, nothing in
6 2017, and nothing in 2018.

7 Now, what was S&P Data doing during this time?
8 Starting in 2014, S&P Data was investing in itself. S&P
9 Data opened two more facilities, one in New Mexico and one
10 in Michigan. S&P Data, as you heard from Plaintiffs,
11 retained a consultant to promote the name further under the
12 S&P Data name.

13 In 2019, however, with no new incident of
14 confusion since 2014 -- and I should say alleged
15 confusion -- coming to the attention of Plaintiffs, nothing
16 in that period, on August 5th, 2019, Plaintiffs sent a cease
17 and desist letter to S&P Data that led to this litigation.
18 Now, in the month leading up to it, Plaintiffs were
19 considering rebranding one of their services, and they were
20 considering a host of names that used "S&P" and "data." And
21 as far as we know, that's the only thing that changed
22 between 2014 and 2019 that led to the cease and desist
23 letter.

24 Now, Plaintiffs are going to attempt to rely
25 upon an incident with McGraw Hill in the late 1990s with the

1 original S&P Data Canada, and Plaintiffs place great weight
2 on what happens later towards the end of that incident,
3 around 1999 or 2000, but Plaintiffs don't dispute that
4 Mr. Plashkes and Mr. Borts were gone from the company by
5 1998. They're not going to be able to show any knowledge of
6 what ultimately happened in the possession of Mr. Plashkes
7 and Mr. Borts.

8 But the Court is also going to hear how a key
9 witness to those events, Mr. Martin Teplitsky, died in 2016
10 after plaintiffs became aware in 2014 of S&P Data. Now,
11 when the McGraw Hill incident arose in the late 1990s,
12 Mr. Dan Plashkes consulted Mr. Martin Teplitsky of the law
13 firm of Teplitsky Colson, and Mr. Plashkes is going to
14 testify to his recollection that the matter was resolved as
15 far as he knew. We have no access to the testimony of
16 Mr. Teplitsky, and we don't have access to the documents of
17 Mr. Teplitsky to refresh anyone's recollection because the
18 law firm which remains today in existence, Teplitsky Colson,
19 they no longer have those records. And then on Plaintiffs'
20 side, the evidentiary record is also suffering from the
21 absence. Plaintiffs have produced only correspondence
22 directed to S&P Data and those operating on its behalf, yet
23 Plaintiffs have produced no correspondence, no communication
24 directed to Plaintiffs from or on behalf of S&P Data during
25 the time period in the late 1990s.

1 Now, this is prejudice that we've suffered, and
2 this is the laches defense which the plaintiffs have made
3 reference to, and the important thing about the laches
4 defense is that if Plaintiffs wait beyond the statute of
5 limitations period, a presumption is raised in favor of
6 undue prejudice and delay. That occurred here, based on at
7 least 2014. Between 2014, 2019, the earliest contact.
8 2020, the lawsuit is filed. And we submit, Your Honor, the
9 plaintiffs are not going to be able to rebut that
10 presumption of undue prejudice.

11 So in short, Your Honor, these parties do very
12 different things. They are not in the same markets. They
13 may sell to the same companies, but, remember, they are not
14 talking to the same people at those companies. A food
15 service vendor and an enterprise software vendor may both
16 sell to the same company, but that doesn't mean that they
17 are targeting that same company in any similar sense.

18 So for all of these reasons, Your Honor, we
19 don't believe the plaintiffs are going to be able to carry
20 their burden to prove likelihood of confusion and to prove
21 dilution. Thank you.

22 THE COURT: Mr. Rawnsley, I thought there was no
23 statute of limitations. What is the length of the statute
24 of limitations that you think applies here?

25 MR. RAWNSLEY: Yes, happy to explain it, Your

1 Honor. So Your Honor's referring to our summary judgment
2 briefing in which we were addressing the straightforward
3 statute of limitations under Delaware State law as to
4 Delaware State common law claims. For federal claims, for
5 Lanham Act claims, which we did not move on, what happens is
6 the Court is supposed to look analogously to the Delaware,
7 or the state in which the Court sits, here Delaware, statute
8 of limitations to determine what the analogous period would
9 be. And a presumption in favor of laches is raised if the
10 delay took beyond what the statute of limitations would be
11 on the similar claims within the State of Delaware, and that
12 would be three years. That's how laches operates at the
13 federal level, Your Honor.

14 THE COURT: All right. Thank you.

15 MR. MILLER: Plaintiffs call Alice Cherry to the
16 stand.

17 MR. MILLER: May we approach, Your Honor, to
18 give the binders?

19 THE COURT: Yes. Yes.

20 DEPUTY CLERK: Please state and spell your full
21 name for the record.

22 THE WITNESS: Alice Cherry. Alice, A-L-I-C-E,
23 Cherry, C-H-E-R-R-Y.

24 DEPUTY CLERK: Do you affirm that the testimony
25 you are about to give to the Court in the case now pending

Cherry - Direct

1 will be the truth, the whole truth and nothing but the
2 truth, you do so affirm?

3 THE WITNESS: I do.

4 DEPUTY CLERK: Thank you. You can sit there.

5 THE WITNESS: Thank you.

6 ALICE CHERRY, the witness herein, after having
7 been duly sworn under oath, was examined and testified as
8 follows:

9 DIRECT EXAMINATION

10 BY MR. MANDEL:

11 Q. Good morning, Ms. Cherry. Can you begin by briefly
12 describing your educational background.

13 A. Sure. I went to college at George Washington
14 University in and graduated in 1996. I had a focus in
15 psychology and got my B.A.

16 Q. And upon graduating from GW, did you begin your
17 professional career?

18 A. I did. I dove right in. I started to work for a
19 bath and beauty products company.

20 Q. And approximately how long were you in that position?

21 A. The company was called Jungle Care. I was there
22 around four years.

23 Q. Was that a marketing position?

24 A. It was a marketing position.

25 Q. And did you move to a new position after that?

Cherry - Direct

1 A. Yes, I started to work for another startup called
2 High Fusion. That was eventually bought by Sylvan.

3 Q. And how long, approximately, were you in that
4 position?

5 A. You know, another four years or so.

6 Q. Was that also a marketing position?

7 A. It was a marketing position.

8 Q. And what did you do next in your career?

9 A. So, I worked for Sylvan, more of their -- the Sylvan
10 section that focused on providing free tutoring to students.

11 Q. And how long were you doing that for?

12 A. Another few years.

13 Q. And what did you do at that point?

14 A. At that point, I was recruited into a role at the
15 McGraw Hill companies.

16 Q. And when you began at McGraw Hill, approximately what
17 year was that?

18 A. 2007.

19 Q. What was your first position there?

20 A. I was in charge of brand and digital.

21 Q. And what side of McGraw Hill's business were you
22 working in?

23 A. So McGraw Hill Company had a few businesses. I was
24 in the higher education division.

25 Q. How long did you stay at the education side of the

Cherry - Direct

1 business?

2 A. So, at education, I stayed for around three years
3 before I moved to a corporate role.

4 Q. And what was your corporate position?

5 A. I was the director of marketing.

6 Q. And did that position have any responsibilities with
7 respect to the Standard and Poor's portion of the McGraw
8 Hill business?

9 A. Yes. So once I moved to corporate marketing for the
10 McGraw Hill Companies -- I mean, it was -- McGraw Hill
11 Companies was a rather large business. I worked for the VP
12 of marketing, who was responsible for the overall
13 positioning of all the businesses that fell underneath
14 McGraw Hill companies, which included Standard and Poor's.

15 Q. And approximately how long were you in that position
16 for?

17 A. I was in that role a little less than a year.

18 Q. What did you do then?

19 A. And then I moved to the Standard & Poor's business.

20 Q. And what position did you take within Standard &
21 Poor's?

22 A. I worked within the marketing, brand and
23 communications department and was in charge of digital
24 marketing there.

25 Q. And how long did you hold that position for?

Cherry - Direct

1 A. Almost two years.

2 Q. What did you do next?

3 A. And then I moved to Capital IQ or S&P Capital IQ, the
4 financial data analytics business, and was the director of
5 marketing there.

6 Q. And can you describe, generally, what that business
7 involved at that time?

8 A. Sure. So Capital IQ focuses on providing financial
9 data analytics, software, feeds, to financial institutional
10 investors. We also work with corporations, insurance
11 companies, as well as academia and universities.

12 Q. And what were your responsibilities in that position?

13 A. So, I worked really closely with the sales and
14 marketing department. I was in charge of overall, you know,
15 marketing and representation of the brand and engagement
16 online and digital channels.

17 Q. How long were you in that position with Capital IQ?

18 A. About four years.

19 Q. And what does that take us to, if you can remember in
20 the progression?

21 A. Sure. It's my life history here. So I moved over to
22 take a larger role across S&P back in corporate marketing as
23 the head of corporate marketing for S&P Global.

24 Q. When did you become the head of corporate marketing
25 for S&P Global?

Cherry - Direct

1 A. In 2016.

2 Q. Now, as of 2016, did McGraw Hill still have an
3 educational component to its business?

4 A. You know, 2016 is when everything changed. You know,
5 McGraw Hill Companies has had a lot of changes sort of
6 leading up to 2016.

7 Q. Can you describe generally what those changes were?

8 A. Sure. I mean, taking a few steps back, Standard &
9 Poor's is a company and division that has been around for a
10 very long time. You know, our heritage really started in
11 the late 1800s. It's a founder's culture where S&P was
12 founded by Henry Varnum Poor in an effort to create
13 transparency in the railroad markets, and that's where Henry
14 Varnum Poor was the creator.

15 Later on, there's been a series of acquisitions
16 through McGraw Hill Companies that led to McGraw Hill and
17 the creation of certain McGraw Hill Company. In -- I think
18 it was in 2013, McGraw Hill Companies sold off its education
19 division because McGraw Hill's best known as a brand, it's
20 known for education. And then McGraw Hill Financial was
21 created. McGraw Hill Financial then rebranded and also
22 launched -- really, it was really focused, essentially, on
23 the financial portfolio, which was Standard & Poor's, and
24 other financial businesses, and that launched in 2016 under
25 S&P Global.

Cherry - Direct

1 Q. Okay. So let's back up and talk about some of that.
2 You mentioned the history going back to the 1800s. When did
3 Standard & Poor's as a company first come into existence?

4 A. Sure. So Standard & Poor's came together in around
5 the 1940s when you have Henry Varnum Poor Publishing bought
6 Standard Statistics, and so Standard & Poor's really, you
7 know, S&P started together collectively in the 1940s.

8 Q. And when -- or how far back does Standard & Poor's
9 use of the S&P trademark go?

10 A. You know, it's before my lifetime, obviously. You
11 know, starting in the 1940s.

12 Q. And do you know that based on your knowledge of the
13 history of the company?

14 A. Yes.

15 Q. Now, when did Standard & Poor's become part of McGraw
16 Hill?

17 A. So, McGraw Hill Companies purchased Standard & Poor's
18 in the 1960s.

19 Q. Okay. So, let's focus in a little more detail on
20 what the business of S&P is. Can you describe generally
21 what Standard & Poor's business has been and is.

22 A. Sure. So, at S&P Global, we're a financial data and
23 analytics company focusing on critical data and insights
24 that are essential, you know, to institutional investors.
25 We have a few different parts of the business. We have

Cherry - Direct

1 ratings. We're best known for our ratings business.

2 Indices, I'm sure you've heard of the S&P 500. We have a
3 market intelligence division as well as work we do with
4 benchmarks in pricing and commodities.

5 Q. So let's break that up. Let's start with the indices
6 business that you identified. Can you just summarize what
7 that business consists of.

8 A. Sure. So at Indices, we offer a range of benchmarks.
9 I mentioned the S&P 500. Probably most familiar with that.
10 We have thousands of indices, you know, ETFs. We license
11 data, and we work really closely with institutional
12 investors or broker dealers.

13 Q. And you mentioned ETFs. Can you just explain how
14 that relationship works in terms of the making it available
15 ETFs.

16 A. Sure, if it's an ETF or an index, that is something
17 that is available by -- for retail investors to invest in --
18 through their broker dealer, and it's something that we have
19 a variety of, you know, offerings, if it is an index or an
20 ETF, if it's focused on company -- you know S&P Commodities
21 or S&P HER or S&P BMI, those are all available through the
22 broker dealers. And we work directly with the institutional
23 investor.

24 Q. And you mentioned the S&P 500. Is that the best
25 known of the various indices?

Cherry - Direct

1 A. It is the best known. It's one of our, sort of, gold
2 standards in benchmarks.

3 Q. And when was that formed?

4 A. In the 1950s.

5 Q. And what was its purpose?

6 A. Its purpose was really to give an indicator of
7 performance of the stock market. It represents the
8 largest -- you know, 500 largest companies, largest 500
9 companies, and it's an indication or composite of the
10 performance.

11 Q. And how has that index been used over the years?

12 A. Wow. It's been used a lot of different ways. You
13 know, I think it depends how you want to view it. It's used
14 sort of by everyday investors. You look on the news, and
15 it's sort of streaming across the screens. It's referenced
16 in articles, and it's an indicator of performance. So if
17 I'm a teacher and I want to understand how my pension fund
18 is performing, I might have investments in the S&P 500 or I
19 might use this as an understanding of what is the overall
20 performance for my investments as an indicator. It also is
21 used on the institutional side as the key part of, you know,
22 financial advisors who are, you know, you know, different
23 financial professionals used as a part of their day-to-day.
24 Q. And focusing specifically on the index business, who
25 are S&P's customers for those services?

Cherry - Direct

1 A. So, you know, when we look at customers, we really
2 look at it as a B-to-B-to-C model. I think a lot of
3 businesses like ours really have to look at that whole
4 picture, you know, to say, okay, who is -- who is using the
5 product? And then who is our sort of direct customer, too?

6 So our direct customers who we sell to every
7 day, if it's licensing data, you know, or working with them,
8 it is, you know, different broker dealers, could be a hedge
9 funds, too. Lots of different a variety of institutional
10 customers. And then there's the end customer, which is the
11 retail investor like you or me, you or me, that's making and
12 choosing to make investments.

13 Q. Now, you also made reference to the ratings business.
14 Can you describe what that entails.

15 A. Sure. The ratings business is an issuer pay model.
16 It's focused on developing opinions based on
17 creditworthiness of, you know, of an entity. We work with
18 corporations.

19 Q. And is there any sense in which that follows a
20 B-to-B-to-C model?

21 A. Yeah, absolutely. I mean, if you are a retail
22 investor and you are interested in the bond market or making
23 different types of investments, you can go to our website.
24 Our information on ratings as well as sort of key data or
25 insights around, sort of, trends in that business is all

Cherry - Direct

1 available on line.

2 Q. Now, you made reference a little bit to the Market
3 Intelligence Services when you were talking about Capital
4 IQ. Can you just summarize very quickly how that service
5 operates today?

6 A. Sure. So the Market Intelligence business primarily
7 is a financial data and analytics and insights business, so
8 we work with institutional investors a few different ways.
9 One is through a subscription model, where they might
10 subscribe to, like, an online software. You know, to log in
11 to get their sort of fundamental data and insights. They --
12 we also work closely -- not every one works in subscription,
13 so, you know, we have some, you know, customers that we have
14 to customize different solutions for using APIs or working
15 within in their systems.

16 Q. And I know you identified some of the direct
17 customers in your previous testimony for that service. Is
18 there any B-to-B-to-C component to this aspect of the
19 business?

20 A. So, with Market Intelligence, one of, you know, our
21 focus areas has been working with academia and universities.
22 So, if you are a business student, you have access to our
23 platform from the subscription model to use as a part of
24 your studies. Additionally, we have, you know, a program
25 with universities where our information, our financial data

Cherry - Direct

1 and insights, are available for anyone at the public, public
2 library or the school.

3 Q. Let me ask you if you can, at this time, turn to
4 Exhibit 126 in your binder, which unfortunately is toward
5 the back, but hopefully you can get there without too much
6 trouble.

7 Do you -- do you have it?

8 A. Almost. I can see it up here, but --

9 All right.

10 Q. Can you identify what Plaintiffs' Exhibit 126 is?

11 A. Sure. This is a brochure from S&P Capital IQ that
12 details the programs that they offer for their -- the
13 business students there.

14 Q. And how is this used?

15 A. I mean, this is used as a part of the curriculum for
16 many classes and as a part of the students' work where they
17 log on and to gain access to the S&P Capital IQ platform as
18 a part of their curriculum.

19 Q. Now, if you can flip a few exhibits back in your book
20 to 124, can you identify what we see there.

21 A. Sure. So, this is SSRN. This is a platform that
22 features the academic research that is using and citing S&P
23 Global Market Intelligence data information.

24 Q. Now, outside of academics, does the data from the
25 Market Intelligence business get licensed in any other way?

Cherry - Direct

1 A. Sure. We have -- we have partnerships and
2 relationship with redistributors.

3 Q. And let me also ask you to turn to Exhibit 125 in
4 your binder. Starting with the first several pages in that,
5 the Finbox part of this exhibit, can you explain what that
6 is.

7 A. Yes, Finbox is an online service that's targeted to
8 the retail investor that provides, you know, basic stock,
9 company information, company data.

10 Q. And how -- or strike that.

11 Is there any relationship between S&P and
12 Finbox?

13 A. Yes, so this is for the retail investor, and you'll
14 see at the bottom, world-class partners. We license data
15 directly from S&P Global Market Intelligence.

16 Q. Are you focusing on Page 8547 at the bottom?

17 A. Yes, 8547.

18 Q. Also on that page, if you look higher up, it talks
19 about flexible pricing, getting a paid plan for as low as
20 \$10 per month. How does that pricing compare to the pricing
21 for direct customers who may have a relationship with the
22 Market Intelligence part of the business?

23 A. Yes. So, you know at \$10 a month, you're really
24 getting some of the more basic fundamental data at a pretty
25 affordable price. We do have more complicated pricing

Cherry - Direct

1 structures for the institutional investment investor, I
2 mean, because they have more, sort of, complicated needs.
3 It's really needs-based, so it is a greater price point for
4 -- for our client.

5 Q. And if I could ask you to just jump ahead in the
6 exhibit a few pages to 8707, there's a heading, Simply Wall
7 Street. Can you explain what the remainder of this exhibit
8 consists of.

9 A. So, this is very similar. This Simply Wall Street is
10 another sort of online company targeting the retail investor
11 to make sure they have the critical tools and intelligence
12 they need to make decisions with their investments.

13 Q. And how does the S&P Global Market Intelligence
14 business interact with Simply Wall Street?

15 A. So Simply Wall Street works with a lot of different
16 brands, and here it says all of our data comes from S&P
17 Global Market Intelligence, the world's premiere provider of
18 financial data, and then it details some of that.

19 Q. Now, in talking about S&P's services, you've
20 mentioned data several times. Can you explain what the
21 significance of data is to S&P's various offerings?

22 A. Sure. You know, at the core, when I defined who we
23 are, really defined us as a financial data analytics and
24 insights company. It goes back to our founders, you know,
25 Henry Varnum Poor, something I'm very proud of, that we were

Cherry - Direct

1 founded on the essence of data, but providing data for
2 transparency to -- to help individuals or companies. And
3 it's sort of a part of our DNA.

4 Q. And does the phrase "S&P data" have any meaning with
5 respect to S&P's business?

6 A. I mean, S&P data is something that we've used in
7 conversations. It's something we've referenced because we
8 have an enormous amount of data.

9 Q. Is the phrase ever used in news reports referencing
10 the company?

11 A. I have seen it used often in news reports.

12 Q. And let me turn you, if I may, to Exhibit 123.

13 MR. BELGAM: Your Honor, I'm assuming we can
14 just move a list of exhibits at the end of the exam. Is
15 that acceptable?

16 THE COURT: Fine by me.

17 MR. BELGAM: Thank you.

18 BY MR. MANDEL:

19 Q. Can you identify what's contained in Exhibit 123.

20 A. So on 123, we have a series of news clippings that
21 start in the 1970s, and they have -- that use S&P Data, that
22 reference S&P data in the news clippings from the -- from
23 Wall Street Journal to industry publications like The
24 American Banker to the New York Times.

25 Q. And we're obviously not going to look through all of

Cherry - Direct

1 this, but I do want to point you to just one example that
2 we've tabbed, hopefully, to save some time here. They're in
3 chronological order also.

4 September 13th, 2000, bears the Bates Number
5 P5806. Can you turn to that?

6 A. Yeah.

7 Q. And can you explain what this piece is about?

8 A. So this piece here is about Schwab renewing the
9 worldwide license with Standard & Poor's. It has a really
10 nice quote from their senior vice president at Schwab who
11 talks about S&P's market data being highly regarded by
12 customers and employees and helps to demystify the process
13 for customers, you know, using innovative information and
14 reporting."

15 MR. MANDEL: And while I appreciate my colleague
16 Mr. Belgam's helpful suggestion, I will, since we've looked
17 at a grouping of these exhibits, at this time offer
18 Plaintiffs' Exhibits 123, 124, 125 and 126.

19 MR. RAWNSLEY: No objection, Your Honor.

20 THE COURT: All right.

21 THE WITNESS: They're all admitted.

22 (PX Exhibit Nos. 123, 124, 125, and 126 were
23 admitted.)

24 BY MR. MANDEL:

25 Q. Let's talk about S&P's advertising and promotion.

Cherry - Direct

1 How does S&P go about promoting itself under the S&P marks?

2 A. So, you know, at S&P -- I'll give you the classic
3 sort of marketer's description, and there's three different
4 ways we promote. One is through our earned media. Earned
5 media is any type of public relations mentioned. We have
6 paid media where we go out and create advertising and
7 engagement with marketplace and customers. And then the
8 third is our owned media. That's something that every
9 company has, which is our own sort of channels, your
10 website, your social media, anything that you own.

11 Q. Okay. We're going to look at a few of those
12 different ways of promotion. Let me ask you to turn, if you
13 can, to Plaintiffs' 94. Can you identify what generally is
14 contained in Exhibit 94 before we look at some of the
15 specifics.

16 A. Sure. In Exhibit 94, you have an overview of the
17 year and the -- some examples of the advertising that was
18 done in that year from 2011 to 2021.

19 Q. And if you jump past the summary, the first grouping
20 of pages starting at Page 20090 and continuing
21 through 20105, can you talk about what's contained there as
22 a group?

23 A. Yeah. This is for S&P Global Market Intelligence and
24 S&P Capital IQ, and this identifies the different types of
25 advertising we've done, from a radio ad on NPR to updates

Cherry - Direct

1 on -- for news letters to digital ads that were sort of
2 issued in the marketplace to videos, commercials, that were
3 run online. So, a selection.

4 Q. And if you look at the next group of pages after that
5 starting with 10093 and running about 25 pages, it ends at
6 10251, are you able to explain what's contained there?

7 A. Sure. So this is a set of the different examples for
8 different years of advertising done for the indices
9 business.

10 Q. And where did ads like this appear?

11 A. So, these were ads that fall underneath our paid
12 programs, and they appeared in print publications like Wall
13 Street Journal, online, and advertisements -- you know,
14 you're walking and you're looking at something on your
15 phone, and you might see something in a newsletter or an ad
16 come up browsing on the web as well as sometimes outdoor,
17 which is called billboard.

18 Q. And as we talk about this grouping of documents, I
19 want to direct your attention forward to Exhibit 105 in your
20 binder. Can you explain what that is and how that relates
21 to what we've just looked at.

22 A. Yes. So this is the advertising budget for indices,
23 and it covers really by year along with the different
24 campaigns that were developed by year.

25 Q. And does this reflect the actual dollars that had

Cherry - Direct

1 been expended on the various campaigns?

2 A. Yes, this is the investment made for those campaigns.

3 Q. What territory does -- did -- do these advertisements
4 cover?

5 A. This is domestic.

6 Q. And if you look underneath all the numbers, you see
7 some headings with names. Can you explain what that is.

8 A. Sure. So, you have a heading called Let's Find Out,
9 you know, or Cartoon. Those are the key names of the ads
10 and underneath are the variations because you create
11 different variations with them.

12 Q. And we're not going to go through all of that,
13 obviously, but focusing you back to Exhibit 94 and the
14 collection of indices ads, are you able to match up any of
15 them to the advertising budget document?

16 A. Sure, I'll give you a few examples. So here, I'll do
17 the first two pages. On the first one, you have Let's Find
18 Out. It's focused on large cap funds, and it says -- and it
19 has horses, and if you scroll back here you have Let's Find
20 Out under 2012.

21 Q. Look again, Exhibit 105. Is that what you're looking
22 at?

23 A. Yes.

24 Q. And --

25 A. And then you have maybe it's like ten down you have

Cherry - Direct

1 workhorse.

2 Q. So that would be a reference to that iteration of the
3 Let's Find Out campaign?

4 A. Correct.

5 Q. And let's just turn to the next page in Exhibit 94,
6 Page 10148. Can you identify what that is with reference to
7 the budget.

8 A. Sure. Well, you have a woman here holding an S&P
9 briefcase, and she's engaging with a youngster here. And he
10 has building blocks in his hand, and this is sort of
11 focusing on creating a strong core using our family of
12 indices, the S&P 500, the S&P 400, S&P 600.

13 Q. And what are the S&P 600 and S&P 400?

14 A. So, those extend to a set of companies referencing
15 the number.

16 Q. So those are different indices?

17 A. Yes. Correct.

18 Q. And staying in Exhibit 94, after we get past the
19 indices ads, can you just tell us briefly what the remainder
20 of the exhibit running from 16621 to the end consists of?

21 A. Sure. These are examples from S&P Global of our
22 social media and some of our posts on social media.

23 Q. What kind of social media platforms are reflected?

24 A. Facebook. Later here we have Twitter. I think I saw
25 Instagram.

Cherry - Direct

1 MR. MANDEL: Okay. At this time, I'm going to
2 offer Exhibits 94 and 105 in evidence.

3 MR. RAWNSLEY: No objection, Your Honor.

4 THE COURT: Admitted without objection.

5 (PX Exhibit Nos. 94 and 105 were admitted into
6 evidence.)

7 BY MR. MANDEL:

8 Q. Let me ask you to flip ahead in your binder to
9 Exhibit 106. And can you identify what that is.

10 A. So 106 is the enterprise marketing budget within
11 public affairs for S&P Global ranging from 2016 to 2021.

12 Q. And can you explain what enterprise marketing is a
13 reference to?

14 A. So enterprise marketing is in reference to corporate
15 marketing at S&P Global.

16 Q. And what forms of corporate marketing does the
17 company engage in?

18 A. Sure. So that is some of the -- you know, series of
19 earned, paid, and owned, but this is sort of the creation of
20 company position and the promotion of it. And we do that a
21 lot of different ways with the paid advertising you would
22 see under the brand marketing line. Or event marketing is
23 really an essential part of how we connect through in-person
24 events, which are starting again, which are great, as well
25 as online events, you know, online webinars and whatnot.

Cherry - Direct

1 Q. And what does the brand marketing line represent in
2 this exhibit?

3 A. So that's the creation and -- as well as any of the
4 paid support for promotion of S&P Global at the corporate
5 level.

6 Q. And what territories are covered by these
7 expenditures?

8 A. This is a global number, but the majority of it is
9 domestically invested.

10 Q. Okay.

11 MR. MANDEL: I'm going to offer Exhibit 106 in
12 evidence.

13 MR. RAWNSLEY: No objection.

14 THE COURT: Admitted without objection.

15 (PX Exhibit No. 106 was admitted into evidence.)

16 BY MR. MANDEL:

17 Q. Let me ask you to turn one more exhibit in your
18 binder to 107. Can you identify what that is.

19 A. So, this is the marketing budget and expenditures for
20 S&P Global Ratings.

21 Q. And what kinds of marketing is reflected in that
22 budget?

23 A. Sure. It's at the top, but this includes promotional
24 items, events, sponsorship, advertisement, and it's really
25 supporting how we -- the different sectors in our business

Cherry - Direct

1 which are sort of listed at the top. Corporate ratings,
2 risks, public finance, financial services, structured
3 finance.

4 Q. And what territory does this cover?

5 A. This is a global budget as well. You know, the
6 majority of public finance, though, is -- is domestic.

7 Q. And when you say "the majority," can you put a
8 percentage on that.

9 A. You know, 60 to 70 across the board, with public
10 finance being almost in its entirety.

11 Q. So 60 to 70 for the other segments besides public
12 finance?

13 A. Correct.

14 MR. MANDEL: Okay. I offer Exhibit 107 in
15 evidence.

16 MR. RAWNSLEY: No objection.

17 THE COURT: Admitted without objection.

18 (PX Exhibit No. 107 was admitting into
19 evidence.)

20 Q. Turning to earned media, does the company track its
21 coverage in the media?

22 A. We do regularly track our coverage in the media.

23 Q. And let me ask you to turn ahead to Exhibit 116 in
24 your binder. Are you able to identify what that document
25 is?

Cherry - Direct

1 A. Yes, this is a monthly communications dashboard.
2 This has, sort of, the full year from 2020 and some of the
3 key metrics that we track as a communications team.

4 Q. And if you turn to the fifth page of the exhibit,
5 7085, can you summarize what is recounted there.

6 A. Yes. So some of the -- you know, since this was a
7 full year, this is a comparison of, sort of, year over year
8 from 2019 to 2020 with our media mentions, for that year in
9 2020 being over, you know 13,000 and then -- I can see
10 better on this side.

11 We also have media outlets that we track, so
12 what are some of the top tier media outlets where we have,
13 sort of, mentions. That includes Bloomberg, Wall Street
14 Journal, you know, the FT.

15 Social sharing. I mean, in today's day and age,
16 I think there's been an explosion of the importance of
17 online. Everything needs to go more online, as we were sort
18 of stuck at home for two years, so any type of engagement
19 such as social shares or any placement online has been
20 really critical.

21 And the last thing we look at is our share of
22 voice, which is on the right.

23 MR. MANDEL: I offer Exhibit 116 into evidence.

24 MR. RAWNSLEY: No objection.

25 THE COURT: Admitted without objection.

Cherry - Direct

1 (PX Exhibit No. 116 was admitted into evidence.)

2 BY MR. MANDEL:

3 Q. For how long a period of time has S&P garnered
4 coverage in the media?

5 A. You know, I -- S&P has been in the media, I think,
6 going back to my other statement, well before my lifetime.
7 It's -- we're a company that's over a century old. They
8 have -- we've been in the media for an extremely long time.
9 It's referencing, you know, S&P, our products, our people,
10 and our thought leaders.

11 Q. Let's move ahead to Exhibit 122 in your binder. And
12 can you summarize what's contained in that exhibit.

13 A. So this is a collection of media mentions that
14 mention S&P and different, sort of, noteworthy publications
15 starting in -- this is the 1970s.

16 Q. And again, we're obviously not going to go through
17 all of this, but I do want to point you to one example of an
18 article. Jumping ahead to December 27th, 1998, page P 13430
19 of the exhibit.

20 Can you briefly summarize what this article
21 consists of.

22 A. So the article title is "Portfolios Et Cetera: What
23 the S&P knew that the Dow didn't." It's a New York Times
24 article and it's focused on the comparison of the S&P to the
25 Dow.

Cherry - Direct

1 Q. And does the article repeatedly refer to it as the
2 S&P?

3 A. Yes, that is correct.

4 Q. What index is that actually talking about?

5 A. The S&P 500.

6 Q. Have you seen the S&P 500 referred to that way in
7 your experience, as the S&P?

8 A. Yes. It seems to be a shorthand, yes.

9 MR. MANDEL: I'd offer Exhibit 122 into
10 evidence.

11 MR. RAWNSLEY: No objection.

12 THE COURT: Admitted without objection.

13 (PX Exhibit No. 122 was admitted into evidence.)

14 BY MR. MANDEL:

15 Q. Does S&P -- well, strike that. Is S&P a public
16 company?

17 A. Yes.

18 Q. Does it regularly report its earnings?

19 A. Yes.

20 Q. And do those earnings get reported in its annual
21 reports?

22 A. Yes.

23 Q. Let me focus you to Exhibit 104 and let me ask you if
24 you are able to identify what that consists of.

25 A. So here, we have the summary from our annual report

Cherry - Direct

1 of our revenue as well as our advertising spending from 2000
2 to 2019.

3 Q. And where does the information that's contained in
4 the summary come from?

5 A. This comes from our annual report.

6 Q. And if you look behind the summary, what do we have
7 in the rest of the exhibit?

8 A. Excerpts of the annual report.

9 Q. And --

10 THE COURT: I'm sorry. Before you go on, do you
11 know why 2003 is missing in that summary?

12 THE WITNESS: It's a good catch. I do not know.
13 I think 2000 -- I see 2007 is missing, too.

14 THE COURT: Right. I saw there was another one,
15 but I couldn't remember which one.

16 THE WITNESS: Yeah.

17 MR. MANDEL: Your Honor, I can clarify. It was
18 in discovery when we produced it, I think we kind of missed
19 those years, and so they just aren't there.

20 THE COURT: Okay.

21 MR. MANDEL: But, obviously, this covers most of
22 the period from 2001 to 2019.

23 BY MR. MANDEL:

24 Q. Now, is all of the revenue that's shown in
25 Exhibit 104 attributable to the United States?

Cherry - Direct

1 A. No, it is not.

2 Q. And can you explain, based on your knowledge of the
3 company and in your role at the company, what the
4 approximate breakdown is between international and domestic
5 revenues.

6 A. Sure, at a high level, but you have to go back to the
7 structure of the business to sort of understand it because
8 when I started with McGraw Hill Companies, our revenue
9 split, which was in 2007, we were around 70 percent
10 international and 30 -- I'm sorry. 70 percent domestic,
11 30 percent international.

12 Q. And has that fluctuated at all over the years?

13 A. Yeah. You know -- and then I think later on, once
14 McGraw Hill Financial was created, you know, and even until
15 today, the international business grew a little bit, so it
16 was more at 60 domestic, 40 international.

17 Q. And focusing just on the domestic revenues, are all
18 of those revenues attributable to the use of the S&P mark?

19 A. So, I guess working backwards from 2016 when we
20 became S&P Global, yes, it's a hundred percent attributable.
21 And then when you look at the period where we were McGraw
22 Hill Financial, it was probably closer to 80 percent.

23 Q. And just let me stop you there just for a second.
24 Roughly what period are we talking about there?

25 A. Like, three years.

Cherry - Direct

1 Q. Between when?

2 A. 2013 to 2016.

3 Q. Okay. And how about prior to McGraw Hill Financial,
4 prior to 2013?

5 A. So, I mean, we had a lot of businesses. So I'm -- I
6 would probably estimate it domestically S&P to be around
7 30 percent of domestic revenue.

8 Q. And that's because at that point you still have the
9 education business?

10 A. We had education, construction, aviation being
11 Professional, McGraw Hill Professional. It was it was --
12 McGraw Hill Companies was akin to on the other company.

13 MR. MANDEL: I offer Exhibit 104 in evidence.

14 MR. RAWNSLEY: No objection.

15 THE COURT: Admitted without objection.

16 (PX Exhibit No. 104 was admitted into evidence.)

17 BY MR. MANDEL:

18 Q. Has the company done any market research into the
19 brand recognition of S&P?

20 A. You know, as a -- as an analytical company, it's
21 really essential that we do market research to understand
22 our brand and our reputation.

23 Q. Let me ask you to turn to Exhibit 111 in your binder
24 and tell me if you can identify what that is.

25 A. So this is a quantitative study conducted by Landor,

Cherry - Direct

1 third-party partner around the time we became S&P Global.

2 Q. And who is Landor?

3 A. Landor is a brand. It's, you know, a well-known
4 branding firm.

5 Q. And what were they studying here?

6 A. So, we were making the transition to S&P Global and
7 wanted to understand more from financial professionals
8 around perceptions and understanding of the brand.

9 Q. And who is actually tested in this study?

10 A. I mean, you have finance managers, CFOs, risk
11 managers, traders. And this was a global study that focused
12 on the U.S., Asia, you know, Europe.

13 Q. Let me ask you to turn to Page 9907 in Exhibit 111
14 where the executive summary begins. Can you summarize at a
15 high level what the basic findings were from the Landor
16 study.

17 A. So, you know, it really was a reinforcement of the
18 strong equity and heritage that S&P Global has and that
19 we're a very strong brand in the financial data and
20 analytics space.

21 Q. And if you jump ahead to 9914 of the document, are
22 there any findings there with respect to the level of
23 recognition found in the study?

24 A. So, here on the left-hand side, it shows that we
25 have, you know, very strong familiarity in the U.S. at

Cherry - Direct

1 86 percent.

2 MR. MANDEL: I offer Exhibit 111 in evidence.

3 MR. RAWNSLEY: No objection.

4 THE COURT: All right. Admitted without
5 objection.

6 (PX Exhibit No. 111 was admitted into evidence.)

7 BY MR. MANDEL:

8 Q. Let's turn to Exhibit 112. Can you identify what
9 that is.

10 A. So this is another quantitative study called the
11 Brand Tracker, which tracks your branding reputation, and
12 this is the research summary from that.

13 Q. Who did that research?

14 A. So, this is done internally by the brand team at S&P
15 Global, and we work closely with a third party to conduct
16 this.

17 Q. And who is the research conducted among?

18 A. The similar audience, financial professionals.

19 Q. Jumping ahead to Page 9694 of the document, which has
20 the heading "key findings," can you, again, at a high level,
21 summarize what the basic findings were from this research?

22 A. Sure. So, you know, you always want to test your
23 brand to understand what are the attributes that it's
24 associated with. So, on the left-hand side here, you have
25 the S&P Global brand is very strong, and it's associated

Cherry - Direct

1 with being trustworthy, dependable, reliable, a leading
2 provider of essential intelligence, and vital. And then on
3 the right-hand side, these are just some of our key
4 takeaways to understand and either act on, looking at having
5 strong familiarity, capability gains, where do these
6 increases come from, those came actually from North America.
7 Looking at what are the drivers of consideration, when
8 someone is considering to work with you and sort of take
9 that next step, we have understanding on that of being
10 trustworthy, you know, offering insights and being easy to
11 work with.

12 Q. And let me ask you to jump ahead to page -- I'm
13 sorry. 9701 of the document. And, can you tell us what
14 finding was made in this study with respect to recognition?

15 A. So, here it says S&P Global is the most recognized
16 company in the field. And it has, you know, high
17 favorability. So this on the left-hand side, you see the
18 growth from '07 to '19 for S&P Global as well as some of
19 other companies in the space their performance.

20 Q. Now, has --

21 MR. MANDEL: I'm sorry, let me offer Exhibit 112
22 in evidence.

23 MR. RAWNSLEY: No objection.

24 THE COURT: Admitted without objection.

25 (PX Exhibit No. 112 was admitted into evidence.)

Cherry - Direct

1 BY MR. MANDEL:

2 Q. Has S&P ever commissioned any study of the value of
3 the S&P brand?

4 A. Yes, we have.

5 Q. Can you jump ahead to Exhibit 117 in your binder and
6 tell us what that is.

7 A. So this is a report out from a -- from a study we did
8 with a company called Brand Finance that details the value
9 of the S&P brand.

10 Q. And if you turn to Page 9945 of the exhibit, what
11 does that reflect with respect to the valuation of that
12 Brand Finance found?

13 A. Sure. You know, Brand Finance is -- worked closely
14 with us. They sort of evaluated everything, and they
15 determined that at S&P Global, we have a 6,000,000,000 in
16 2020, a \$6 billion value on the brand.

17 MR. MANDEL: I offer Exhibit 117 -- I'm sorry.
18 Yes, Exhibit 117 in evidence.

19 MR. RAWNSLEY: No objection.

20 THE COURT: Admitted without objection.

21 (PX Exhibit No. 117 was admitted into evidence.)

22 BY MR. MANDEL:

23 Q. Now, does Brand Finance provide annual rankings on
24 its strength of brands?

25 A. They do publish different rankings as a part of their

Cherry - Direct

1 course of work. It's independent of, you know, of us.

2 Q. And let me ask you to turn to Exhibit 118 in your
3 binder. Can you tell us what that document is.

4 A. So this is from June 2020. It's from Brand Finance.
5 They issued the commercial services 50, the most valuable
6 and strongest commercial services brands in 2020.

7 Q. And if you look at Page 6937 of the exhibit, can you
8 find S&P Global there.

9 A. So out of the 50, S&P Global is listed as number ten,
10 and our brand value went up to 6.8 million.

11 MR. MANDEL: I offer Exhibit 118 into evidence.

12 MR. RAWNSLEY: No objection.

13 THE COURT: All right. Admitted without
14 objection.

15 (PX Exhibit No. 118 was admitted into evidence.)

16 BY MR. MANDEL:

17 Q. Let me move ahead to Exhibit 119. Can you explain
18 what that is.

19 A. This is another Brand Finance annual report looking
20 at the U.S. 50, the most valuable and strongest American
21 brands.

22 Q. And how does this report compare to Exhibit 118?

23 A. So this report is a little bit different because you
24 have Disney, Coca-Cola, Amazon, Visa. You have, sort of,
25 really, a range of any brand, not just being commercial.

Cherry - Direct

1 Q. Okay. And let me turn your attention to page -- hard
2 to read but 6962, I believe, and if you look, since the
3 print is small, I'll direct you specifically -- do you see
4 S&P Global at Number 114 in the document?

5 A. Yes, that is correct.

6 Q. What does that reflect?

7 A. That is our ranking with the top 500 American brands.
8 We're listed as 114.

9 MR. MANDEL: I offer Exhibit 119 into evidence.

10 MR. RAWNSLEY: No objection.

11 THE COURT: Admitted without objection.

12 (PX Exhibit No. 119 was admitted into evidence.)

13 BY MR. MANDEL:

14 Q. Has S&P won any industry awards?

15 A. Yeah, we've -- we are recognized across the industry
16 for a variety of things from best places to work to
17 recognizing our products and our services.

18 Q. And let me point you to Exhibit 120 in your binder.
19 Can you identify what that is and what it shows.

20 A. This is a -- an award from Waters awarding S&P -- S&P
21 Global -- I'm sorry -- S&P Capital IQ as the best data
22 analytics provider.

23 Q. And if you flip over the page to the next page of the
24 exhibit, 18056, what's reflected there?

25 A. We were also recognized as the best overall data

Cherry - Direct

1 provider.

2 MR. MANDEL: Let me offer Exhibit 120 in
3 evidence.

4 MR. RAWNSLEY: No objection.

5 THE COURT: Admitted without objection.

6 (PX Exhibit No. 120 was admitted into evidence.)

7 BY MR. MANDEL:

8 Q. Moving ahead to the next exhibit in your binder, 121,
9 can you explain what that is.

10 A. These are a listing of other sort of various awards
11 across the business recognizing our ratings.

12 MR. MANDEL: I offer Exhibit 121 into evidence.

13 MR. RAWNSLEY: No objection.

14 THE COURT: Admitted without objection.

15 (PX Exhibit No. 121 was admitted into evidence.)

16 BY MR. MANDEL:

17 Q. Now, Ms. Cherry, you're aware that in this case,
18 Defendants are using the name S&P Data in connection with
19 their call center business; correct?

20 A. Correct.

21 Q. Can you explain, from a marketing perspective, what
22 you believe that usage does or any impact it has on the S&P
23 brand?

24 A. Sure.

25 MR. RAWNSLEY: Objection, Your Honor. That's

Cherry - Direct

1 expert testimony.

2 THE COURT: Well, I think if she's talking --

3 I'm going to overrule the objection.

4 BY MR. MANDEL:

5 Q. You can answer.

6 A. You know, so I think brand and reputation are core to
7 any business, and in S&P, we're known for transparency as
8 providing quality data and being trustworthy and a brand is
9 a huge asset for a business. It's why people come to work
10 for you or it's -- for sales teams, it allows them to make
11 calls and people to pick up the phone because they know that
12 it's a trustworthy brand with S&P. At the end of the day,
13 you want to really eliminate confusion, you know, about your
14 brand and ensure that you limit sort of any type of risk
15 that you have to it.

16 MR. MANDEL: I have no further questions, Your
17 Honor.

18 THE COURT: All right. Mr. Rawnsley.

19 MR. RAWNSLEY: Your Honor, may we approach with
20 binders?

21 THE COURT: Yes.

22 MR. FINEMAN: Your Honor, may I approach with
23 this?

24 THE COURT: Yes.

25 THE WITNESS: Do I need this one anymore?

Cherry - Cross

1 MR. FINEMAN: I'm not sure.

2 THE COURT: Okay. Thank you.

3 CROSS-EXAMINATION

4 BY MR. RAWNSLEY:

5 Q. Good morning, Ms. Cherry.

6 A. Good morning.

7 Q. Welcome to Delaware.

8 A. Thank you.

9 Q. In 2007, you began to work for McGraw Hill companies;
10 correct?

11 A. Correct.

12 Q. And the McGraw Hill companies had an education
13 division; correct?

14 A. Right.

15 Q. And I heard you say they also had a construction
16 division; correct?

17 THE COURT: I'm sorry, Ms. Cherry. You need to
18 speak in terms of answer, not just nodding your head. Make
19 sure you speak loud enough.

20 THE WITNESS: Okay. No problem.

21 Yes, it had a construction division.

22 BY MR. RAWNSLEY:

23 Q. And I believe they had several publications as well;
24 correct?

25 A. Yes.

Cherry - Cross

1 Q. And the divestiture occurred in 2013 of the McGraw
2 Hill Education; is that correct?

3 A. Correct.

4 Q. And then McGraw Hill Financial was renamed after the
5 divestiture; correct?

6 A. Correct.

7 Q. And McGraw Hill Financial was renamed S&P Global in
8 2016; correct?

9 A. Yes.

10 Q. Now, in 2015, McGraw Hill Financial began discussing
11 strategy to launch what became S&P Global; correct?

12 A. Yes.

13 Q. And if you could please look in your binder to DTX
14 64.

15 A. 64?

16 Q. 64, please.

17 A. Okay.

18 Q. And you see the email at the bottom at the screen --
19 correct? -- from Mr. Douglas Peterson?

20 A. Yes.

21 Q. Who is Mr. Douglas Peterson?

22 A. He is our president and CEO.

23 Q. Okay. And you are a recipient of that email;
24 correct, Ms. Cherry?

25 A. Yes.

Cherry - Cross

1 Q. Okay. And if we can go to the next page, the next
2 page, please, so in that email, there's some names including
3 S&P Data Analytics and S&P DataLitiX with an X; correct?

4 A. On the back page, yes.

5 Q. And this was in connection with the strategy to
6 rename McGraw Hill Financial; correct?

7 A. It is in relation to that, yes.

8 Q. And if we could go up to the top email, please.

9 And you write back to Mr. Peterson; correct?

10 A. Yes.

11 Q. And in fact, you recommend several names to him;
12 correct?

13 A. Correct.

14 Q. And those names include S&P Data Analytics?

15 A. Yes.

16 Q. And S&P Data and Insights; correct?

17 A. Yes.

18 Q. And if we go down a little further, we can see S&P
19 Global Data and Analytics Services; correct?

20 A. Yes.

21 Q. And we can also see S&P -- well, strike that.

22 So after the name change to S&P Global,
23 Plaintiffs conducted some brand equity research; correct?

24 A. Repeat that.

25 Q. Plaintiffs conducted some brand equity research;

Cherry - Cross

1 isn't that correct?

2 A. We did.

3 Q. Okay.

4 MR. RAWNSLEY: And before I move on, I'd like to
5 move DTX 64 into evidence.

6 MR. MANDEL: No objection.

7 THE COURT: Admitted without objection.

8 (DTX Exhibit No. 64 was admitted into evidence.)

9 BY MR. RAWNSLEY:

10 Q. Okay. Can you go to DTX 72, please?

11 And you were involved in the preparation of this
12 document; correct?

13 A. I was.

14 Q. Okay. Can you go to Page 14, please.

15 So, at the time of this presentation, S&P had
16 56 percent recognition as a financial data and analytics
17 provider; correct?

18 A. Yes.

19 Q. Now, you continue to track the health of the S&P
20 Global brand; correct?

21 A. Yes.

22 Q. Okay. Could you look at DTX 86, please, in your
23 binder. And just let me know when you're ready.

24 A. Okay. 86. Okay.

25 Q. Now, DTX 86 is a brand health assessment; correct?

Cherry - Cross

1 A. Yes.

2 Q. And I believe in your testimony a moment ago, we just
3 saw a version of this from 2020; correct?

4 A. Correct.

5 Q. Okay. Now, the methodology of this was to conduct an
6 online survey; correct?

7 A. Yes.

8 Q. And that survey was among financial professionals;
9 correct?

10 A. Yes.

11 Q. And policy influencers; correct?

12 A. Yes.

13 Q. Okay. Can you go to slide ten, please.

14 Now, this slide reports the results of a survey
15 for unaided awareness; correct?

16 A. Yes, it does.

17 Q. Okay. And if we look at the question at the bottom,
18 it says, "Financial professionals were asked when you think
19 of companies in the financial intelligence data and
20 analytics industry, which ones come to mind"; correct?

21 A. Yes, that's the question.

22 Q. And we can see the result in the chart above,
23 correct?

24 A. That is the result.

25 Q. And recognition for S&P Global was six percent;

Cherry - Cross

1 correct?

2 A. That is unaided. Yes.

3 Q. Correct. Unaided awareness among financial
4 professionals of S&P Global was six percent; correct,
5 Ms. Cherry?

6 A. Yes.

7 Q. And in 2015, we see some data to the right; correct?

8 A. Yes.

9 Q. And S&P and Standard & Poor's had 11 percent
10 recognition in 2015; correct?

11 A. Yes.

12 MR. RAWNSLEY: I'd like to move DTX 86 into
13 evidence.

14 MR. MANDEL: No objection.

15 THE COURT: Admitted without objection.

16 (DTX Exhibit No. 86 was admitted into evidence.)

17 BY MR. RAWNSLEY:

18 Q. Could you please go to DTX 90 in your binder,
19 Ms. Cherry.

20 Now, you see another brand health 2018 -- well,
21 strike that. We see another research summary; correct?

22 A. Yes.

23 Q. To measure brand health; correct?

24 And this one is for 2018; correct?

25 A. Correct.

Cherry - Cross

1 Q. Okay. And for this study, you were, again,
2 questioning financial professionals and policy influencers;
3 correct, Ms. Cherry?

4 A. Yes.

5 Q. Okay. Could you please go to Slide 19 of this
6 document.

7 A. Sorry.

8 Q. Please take your time.

9 A. Okay.

10 Q. Okay. And the slide says "conclusions and
11 recommendations" at the top; correct?

12 A. Yes, it does.

13 Q. And then there's some notes to the slide below it,
14 correct?

15 A. There are.

16 Q. And they follow under where it says "conclusions";
17 correct?

18 A. Correct.

19 Q. And it says, "Despite improvements, unaided awareness
20 is still low, particularly in North America, four percent";
21 correct?

22 A. Yes.

23 MR. RAWNSLEY: I move DTX 90 into evidence, Your
24 Honor.

25 MR. MANDEL: No objection.

Cherry - Cross

1 THE COURT: All right. Admitted without
2 objection.

3 (DTX Exhibit No. 90 was admitted into evidence.)

4 BY MR. RAWNSLEY:

5 Q. Now, S&P Global today has four segments, I believe
6 you spoke about; correct?

7 A. Yes, I mean, we've merged with IHS Markit. We have
8 additional segments.

9 Q. Correct. And that's a recent event; right?

10 A. Yes, just two weeks ago.

11 Q. And IHS Markit tracks sales of commodities; right?

12 A. Yes, and data and yeah.

13 Q. So, there's S&P Dow Jones indices segment; correct?

14 A. Yes.

15 Q. And there's S&P Global Ratings?

16 A. Correct.

17 Q. And S&P Global Market Intelligence?

18 A. Yes.

19 Q. Okay and S&P Global Platts; correct?

20 A. Yes.

21 Q. And you regard S&P Global's competitors as Refinitiv;
22 correct?

23 A. Well, our competitors really differ, you know, the
24 set of companies we look at really differ by business to
25 business. Refinitiv is one of them for the businesses, yes.

Cherry - Cross

1 Q. Refinitiv is a competitor of S&P; correct,
2 Ms. Cherry?

3 A. Specifically S&P Global Market Intelligence.

4 Q. And Bloomberg is a competitor; correct?

5 A. Yes.

6 Q. And FactSet is a competitor?

7 A. Yes.

8 Q. And Moody's is a competitor; correct?

9 A. Correct.

10 Q. And Fitch is a competitor; correct?

11 A. Correct.

12 Q. Now, S&P Global has customers in academia, as I
13 believe we saw in your direct examination; correct?

14 A. Yes.

15 Q. And commercial banking?

16 A. Mm-hmm. Yes.

17 Q. And government regulatory agencies --

18 A. Yes.

19 Q. -- correct?

20 Insurance?

21 A. Yes.

22 Q. Investment banking?

23 A. Yes.

24 Q. Investment managing?

25 A. Yes.

Cherry - Cross

1 Q. Private equity?

2 A. Yes.

3 Q. And industrials; correct?

4 A. Yes.

5 Q. Now, Plaintiffs obtained revenues in a variety of
6 ways, and one of those ways is from subscriptions; correct?

7 A. Yes.

8 Q. And those include subscriptions to the desktop
9 services; correct?

10 A. Yes.

11 Q. And desktop services are Market Intelligence and
12 Capital IQ; correct?

13 A. Yes, we merged them into one since then, but yes.

14 Q. Okay.

15 A. Essentially.

16 Q. When last we spoke, they were two; correct?

17 A. They were two, and I noted we were merging them, so.

18 Q. Okay. And there's no list price for these desktop
19 services; correct?

20 A. No, they are -- it's price to value, is the -- is the
21 model we use.

22 Q. Can you explain price to value?

23 A. So, price to value is really we work on a
24 customer-by-customer basis to understand their needs because
25 it's never as cut and dry as "I just need access to

Cherry - Cross

1 subscription." We're working with highly, you know --
2 sometimes different types of requirements from customers or
3 requests, so depending on what that is, we will customize a
4 solution for them.

5 Q. And so, the features the client has access to is
6 customized based on each customer's unique needs; correct?

7 A. Yes.

8 Q. And it takes time to find out what these needs are;
9 correct?

10 A. Yes.

11 Q. Now, before subscribing to one of the desktop
12 platforms, you have to speak with someone from S&P Global;
13 correct?

14 A. Yes.

15 Q. I can't just go online, put in my credit card, get
16 access to that account?

17 A. As a retail investor, you could do that through a --
18 Simply Wall Street, you know, the Finbox programs. Through
19 some of our distribution arms.

20 Q. Ms. Cherry, I can't go in today and get access to S&P
21 Global's desktop platform by just putting in my credit card
22 number; correct?

23 A. Well, you could get access to the data, but to --
24 there's different levels that you would have access to. So
25 you would have access, as a retail investor, to some of our

Cherry - Cross

1 distribution platforms. An institutional, like the ones you
2 just listed, is something that is a longer-lead-time
3 process. Yes.

4 Q. Ms. Cherry, I'm asking specifically about S&P
5 Global's desktop platforms; correct?

6 A. Correct.

7 Q. Do you understand that?

8 A. Okay. I thought you were -- I guess our desktop
9 platforms, I look at -- thank you for clarifying. I wasn't
10 sure if you were talking about just the data and information
11 available on them.

12 Q. I am not just speaking about the data and information
13 available on them, Ms. Cherry. I'm asking specifically
14 about the service that S&P Global offers as a desktop
15 platform. Do you understand that?

16 A. Now, I do.

17 Q. Okay.

18 A. And so --

19 Q. I can't go back to my office, put in my credit card
20 number, and gain access to that today, can I?

21 A. You cannot.

22 Q. Thank you.

23 Now, clients fall into three strategic pricing
24 tiers; correct?

25 A. Yes, they do.

Cherry - Cross

1 Q. Primary, core, and strategic?

2 A. Yes.

3 Q. Primary clients whose contracts are less than

4 \$50,000; correct?

5 A. That's right.

6 Q. And core clients whose contracts run from 50,000 to a

7 million; correct?

8 A. Correct.

9 Q. And core is the biggest group; correct?

10 A. Correct.

11 Q. And strategic are clients whose contracts exceed a

12 million dollars; correct?

13 A. Yes.

14 Q. And it's not an instant process to get a contract for

15 the desktop platforms; correct?

16 A. It is not.

17 Q. The fastest it takes to get a contract is a few

18 months; correct?

19 A. That's a good estimate.

20 Q. And one of the major users of these desktop platforms

21 are investment bankers; correct?

22 A. Yes.

23 Q. Now, S&P Global also obtains transaction revenue from

24 its rating service; correct?

25 A. Correct.

Cherry - Cross

1 Q. Okay. And the price of those services varies
2 depending on the client; correct?

3 A. Correct.

4 Q. And S&P Global also receives what it calls
5 non-subscription and transaction revenue; correct?

6 A. Correct.

7 Q. And that includes fees for credit ratings; correct?

8 A. Yes.

9 Q. And the clients for credit ratings are government
10 institutions, banks and corporations; correct?

11 A. Mm-hmm. Yes.

12 Q. Individuals don't purchase those services, correct?

13 A. Individuals do not purchase credit ratings.

14 Q. And S&P Global provides those services under a
15 contract as well; correct, Ms. Cherry?

16 A. Sorry. You're talking little fast. I can't hear
17 you.

18 Q. My apologies. I'll try to slow down.

19 S&P Global provides those services under their
20 contract as well, Ms. Cherry; correct?

21 A. Yes.

22 Q. And S&P Global draws revenue from what it calls
23 asset-linked fees; correct?

24 A. Yes.

25 Q. And those are fees charged to entities that want to

Cherry - Cross

1 offer an investment product based on one of S&P Global's
2 indices; correct?

3 A. Yes.

4 Q. And the revenues for that service depend on the
5 amount of assets under management; correct?

6 A. Correct.

7 Q. And the client paying S&P Global for that service is
8 the institution offering the product; right?

9 A. Yes.

10 Q. And entering into a contract to create an investment
11 product is not a quick purchase, either; right, Ms. Cherry?

12 A. It is not.

13 Q. Now, as to the received revenue for the sales
14 usage-based royalties --

15 THE REPORTER: I'm sorry. Could you repeat that
16 question?

17 MR. RAWNSLEY: Sales-usage-based royalties.

18 THE WITNESS: Correct. Yes.

19 BY MR. RAWNSLEY:

20 Q. And that's related to price reporting from Platts;
21 correct?

22 A. Correct.

23 Q. Okay. And Platts reports on commodities; correct?

24 A. Yes.

25 Q. And the royalty is tied to trading volumes; correct?

Cherry - Cross

1 A. Correct.

2 Q. And institutions and corporate entities pay those
3 royalties; correct, Ms. Cherry?

4 A. Yes.

5 Q. Now, S&P Global promotes itself in a variety of ways
6 we've just heard you testify to; correct?

7 A. Yes.

8 Q. It hosts events and conferences; correct?

9 A. Many, yes.

10 Q. It publishes the work of its economists, analysts and
11 its writers; correct?

12 A. Yes.

13 Q. Its work appears in publications like The New York
14 Times, The Financial Times, the Wall Street Journal;
15 correct?

16 A. Yes.

17 Q. And if you could look at DTX 88 in your binder,
18 please, Ms. Cherry. Now, you're the recipient of this
19 email; correct, Ms. Cherry?

20 A. Yes.

21 Q. Okay. And I'd just like to look at the attachment
22 just for reference as we go through some of the events that
23 S&P Global engages in.

24 So, S&P Global engages in webinars?

25 A. Yes, we do.

Cherry - Cross

1 Q. It offers seminars and training courses?

2 A. Yes.

3 Q. And those training courses are in the areas of
4 expertise that S&P Global offers; correct?

5 A. Yes.

6 Q. And -- such as training for financial analysts;
7 correct?

8 A. Yes, financial professionals.

9 Q. And S&P Global sponsors events held by others;
10 correct?

11 A. Sponsors events held by others, yes.

12 Q. And S&P Global's direct marketing is
13 business-to-business; correct?

14 A. Our direct marketing, yes; however, we work really
15 closely, like in the indices group, with providing broker
16 dealers with information about our index offering that goes
17 to FA's. That then is shared with the retail industry.

18 Q. But S&P Global's direct marketing is
19 business-to-business; correct?

20 A. Sure. Our primary, yes.

21 Q. Can we go up to the second page of the email.

22 Do you see where it says Mr. Shawn Ryan there?

23 A. Yes.

24 Q. Okay. And then if we go beneath that, there's a
25 stylized logo. It says S&P Global; correct?

Cherry - Cross

1 A. Yes.

2 Q. And there's a bar on top?

3 A. Yes.

4 Q. S&P Global adopted that logo with the renaming of
5 McGraw Hill Financial; correct?

6 A. Yes.

7 Q. What color does that bar typically have?

8 A. I mean, it depends. It's either black or it could be
9 knocked out in white.

10 Q. And do you have the S&P Global at the bottom of your
11 emails when you send emails, that style I just put up?

12 A. I believe that logo is our main logo. It's on
13 everything.

14 Q. It's on everything; correct?

15 A. Yes.

16 MR. RAWNSLEY: Move to admit DTX 88.

17 MR. MANDEL: No objection.

18 THE COURT: Admitted without objection.

19 (DTX Exhibit No. 88 was admitted into evidence.)

20 BY MR. RAWNSLEY:

21 Q. Okay. Could we go to PTX 104? I think it's probably
22 in the other binder.

23 Now, do you recall giving testimony about this
24 document?

25 A. Yes.

Cherry - Cross

1 Q. Now, the first line says the advertising spend in
2 2001 was 107 million; correct?

3 A. Yes.

4 Q. That was not advertising spend on the S&P Global
5 brand alone; correct?

6 A. It was not. This represented McGraw Hill Companies
7 across all of the portfolio.

8 Q. Okay. And that included, I believe we spoke earlier,
9 McGraw Hill Education; correct?

10 A. It included Education, Construction, I believe,
11 Aviation. You know, a list of companies.

12 Q. Okay. Thank you.

13 And can we go down three pages, please. One
14 more, please.

15 So, we're on P-004273. This is a Consolidated
16 Statement of Income. Do you see that?

17 A. Yes, I do.

18 Q. Okay. And then go down to the next page. You see
19 the advertising spend there. See where it says Advertising
20 Expense?

21 A. Yes.

22 Q. That figure is not broken out among any of the
23 businesses; correct?

24 A. Correct.

25 Q. And it's not broken up by region; correct?

Cherry - Cross

1 A. It is not.

2 Q. Okay. Now, I heard you testify about Brand Finance
3 rankings; correct?

4 A. Correct.

5 Q. Okay. Could we pull up PTX 117? I believe it's in
6 evidence.

7 Okay. Now, I believe I heard you say S&P Global
8 commissioned this; correct?

9 A. Correct.

10 Q. Do you know how much it cost?

11 A. I do not.

12 Q. If you go down to P-009958, and this is a slide with
13 Key Takeaways; correct?

14 A. Yes, Key Takeaways from Management Interviews.

15 Q. Thank you.

16 And one of the key takeaways was -- is "To date,
17 the S&P Global portfolio management is still a work in
18 progress"; correct?

19 A. Correct.

20 Q. And "portfolio" here refers to branding; correct?

21 A. Correct.

22 Q. And if we -- actually if we look below that, it says,
23 "The key to understanding whether brand strategy is working
24 or not will depend on whether the S&P Global brand
25 successfully transforms from a fractious group of brands and

Cherry - Cross

1 cultures"; correct?

2 A. Yes.

3 Q. Now, during your direct examination, you testified
4 about Brand Finance's U.S. 500; is that correct?

5 A. Yes.

6 Q. Okay. And that was dated 2020; correct?

7 A. Yes.

8 Q. Okay. S&P Global did not make Brand Finance's U.S.
9 500 in 2017; correct, Ms. Cherry?

10 A. I do not believe so.

11 Q. And S&P Global did not make Brand Finance's U.S. 500
12 in 2018; correct?

13 A. I don't believe so.

14 Q. And then in 2019, S&P Global commissioned Brand
15 Finance as a consultant to give advice about its brand;
16 correct?

17 A. We did.

18 Q. And then in 2020, S&P Global makes its debut
19 appearance in the U.S. 500; correct, Ms. Cherry?

20 A. That is correct.

21 Q. So you spoke a little bit about the Defendant S&P
22 Data; correct?

23 A. Pardon?

24 Q. You spoke a little bit on your direct examination
25 about the defendant in this case, S&P Data; correct?

Cherry - Cross

1 A. Yes.

2 Q. And you have been aware of S&P Data since 2014 at the
3 latest; correct?

4 A. Correct.

5 Q. Okay. Could you please look at DTX 37.

6 A. You said 37?

7 Q. 37, Ms. Cherry.

8 A. Oh, it's in this one? It's in a different binder?

9 Q. It could be. You'll be looking for the defendant's
10 binder. Cross binder, it says.

11 A. Oh, 37. Got it.

12 Q. Okay. And you testified about this document in your
13 deposition; correct?

14 A. I did.

15 Q. Okay?

16 A. Yes.

17 Q. Now, you see an email from Outsell Headlines;
18 correct?

19 A. Yes.

20 Q. And Outsell Headlines is a service that provides news
21 headlines; correct?

22 A. Yes.

23 Q. And we can see one of the headlines here is that "S&P
24 Data hires cofounder of Center Partners David Geiger as
25 President of Emerging Markets." Do you see that?

Cherry - Cross

1 A. Yes.

2 Q. Now, this email from Outsell Headlines went to a
3 Mr. Patrick Milano; correct?

4 A. Yes.

5 Q. Patrick Milano is an attorney; correct?

6 A. Correct.

7 Q. He's an attorney with S&P Global; correct?

8 A. Was, yes.

9 Q. And Mr. Milano forwards it to Scott Bennett; correct?

10 A. Correct.

11 Q. And Mr. Scott Bennett at that time was an attorney
12 for Plaintiffs as well; correct?

13 A. Yes.

14 Q. And Mr. Bennett, in turn, forwards to it to a
15 Ms. Susan Winter; correct?

16 A. Correct.

17 Q. And Ms. Winter was, at that time, an attorney for the
18 plaintiffs; correct?

19 A. Correct.

20 Q. And Ms. Winter was responsible for trademarks;
21 correct?

22 A. Correct.

23 Q. Okay.

24 MR. RAWNSLEY: Move to admit DTX 37.

25 MR. MANDEL: No objection.

Cherry - Cross

1 THE COURT: Admitted without objection.

2 (DTX Exhibit No. 37 was admitted into evidence.)

3 BY MR. RAWNSLEY:

4 Q. Can you please go to DTX 38, Ms. Cherry.

5 Now you, testified about this at your deposition
6 as well; correct?

7 A. Correct.

8 Q. Now, this is an email from a Mr. Chip Merritt;
9 correct?

10 A. Correct.

11 Q. And Mr. Merritt is Plaintiffs' head of investor
12 relations at the time of this email; correct?

13 A. Correct.

14 Q. And this email is April 7th, 2014; correct?

15 A. Correct.

16 Q. Mr. Merritt forwards the email to Kenneth Vittor;
17 correct?

18 A. Correct.

19 Q. And Kenneth Vittor, at that time, was the general
20 counsel of Plaintiffs; correct?

21 A. Correct.

22 Q. Now, you see some underlining in the article at the
23 bottom; correct?

24 A. Yes.

25 Q. And this is an article that also says S&P Data hires

Cherry - Cross

1 cofounder of Center Partners David Geiger as president of
2 emerging markets; correct?

3 A. Correct.

4 Q. And there's underlining because someone in this chain
5 of emails thought it was important to highlight certain
6 parts of this press release; correct?

7 A. Correct.

8 Q. Now, Mr. Vittor also forwards this email to
9 Ms. Winter; correct?

10 A. Correct.

11 Q. And Ms. Winter sends it to a JPaine@proskauer.com.
12 Do you see that, Ms. Cherry?

13 A. Yes.

14 Q. "Jpaine" is Jessica Paine; correct?

15 A. I believe so.

16 Q. And she was an attorney with the law firm of
17 Proskauer Rose; correct?

18 A. Yes.

19 Q. And at this time, Proskauer Rose handled trademark
20 matters as outside counsel for Plaintiffs; correct?

21 A. Correct.

22 Q. Now, in 2014, Plaintiffs conducted an investigation
23 into S&P Data; correct?

24 A. Correct.

25 Q. Proskauer hired a firm named Marksmen; correct?

Cherry - Cross

1 A. Correct.

2 Q. Marksmen is an investigative firm; correct?

3 A. Yes.

4 Q. And you assumed that the services offered by S&P Data
5 were one of the subjects of that investigation; correct?

6 A. Correct.

7 Q. You would expect that the website of S&P Data would
8 have been a first stop for Marksmen; correct?

9 A. For anyone, sure, yes.

10 Q. No one at Plaintiffs reached out to S&P Data as a
11 result of the press release we just saw; correct?

12 A. To the best of my knowledge, right.

13 MR. RAWNSLEY: Move to admit DTX 38, Your Honor.

14 MR. MANDEL: No objection.

15 THE COURT: All right. Admitted without
16 objection.

17 (DTX Exhibit No. 38 was admitted into evidence.)

18 BY MR. RAWNSLEY:

19 Q. Can you look at DTX 41, please. And we're going to
20 start at the bottom.

21 A. Start at the bottom?

22 Q. Yes.

23 A. Okay.

24 THE COURT: So, Mr. Rawnsley, I think we ought
25 to take a morning break here.

Cherry - Cross

1 MR. RAWNSLEY: Happy to.

2 THE COURT: But even though, before we do, I do
3 just have one question. In the earlier things where --
4 where you were being asked about the brand and the unaided
5 awareness recognition, what do you understand by "unaided
6 awareness" to mean.

7 THE WITNESS: So when you look at your brand
8 health, you look at a combination of factors around it, in
9 addition to unaided awareness, that is not necessarily the
10 most important. But "unaided awareness" would be if I said
11 to you, "Can you name a soda brand." And you would say,
12 probably, Coca-Cola or something like that. That is who
13 comes to mind without, sort of, prompting. Are you familiar
14 with -- are you familiar with any of these soda brands, Coke
15 Pepsi, whatever? Does that make sense? So you have
16 unaided --

17 THE COURT: So, when you say do I know any soda
18 brands, I can go Coke, Pepsi, Sprite, so on until I run out
19 of brands?

20 THE WITNESS: Yes, and that is an unaided
21 question. Now, when you look at -- at brand health, you
22 want to look at your --

23 THE COURT: So actually, you've answered my
24 question.

25 THE WITNESS: Okay.

Cherry - Cross

1 THE COURT: Okay. Thank you.

2 All right. We'll take a 15-minute break.

3 DEPUTY CLERK: All rise.

4 (Recess was taken.)

5 THE COURT: All right. Come on back,

6 Ms. Cherry.

7 All right. Everyone be seated.

8 Go ahead, Mr. Rawnsley.

9 MR. RAWNSLEY: Thank you, Your Honor.

10 BY MR. RAWNSLEY:

11 Q. So I believe we left off at DTX 41. Do you have
12 that, Ms. Cherry?

13 A. I do.

14 Q. Let's go to the bottom of this email, please. Now,
15 at the bottom of this email, we see an email from Mr. Doug
16 DiLillo correct?

17 A. Yes.

18 Q. And Mr. DiLillo introduces himself as the Executive
19 Assistant to President Dan Bemis at S&P Data; correct?

20 A. Correct.

21 Q. Mr. DiLillo sends this message to an Ursula Cottone,
22 Key Bank; correct?

23 A. Correct.

24 Q. And Ms. Cottone, in turn, sends it to Ms. Kelly
25 McNamara, also at Key Bank; correct?

Cherry - Cross

1 A. Correct.

2 Q. Ms. McNamara sends it to Laura Albert at McGraw Hill
3 Financial; correct?

4 A. Yes, Laura is at S&P Capital IQ.

5 Q. And then if we go up further, the email reaches you;
6 correct?

7 A. Correct.

8 Q. And it reaches Ms. Pavani --

9 A. Correct.

10 Q. -- Thagirisa? And Ms. Thagirisa is an attorney;
11 right, Ms. Cherry?

12 A. She is.

13 Q. Now, the subject is "SP Data" legal/brand issue added
14 to it from the original email from Mr. DiLillo; correct?

15 A. Yes.

16 Q. If you could please go -- well, before we leave this
17 document, what was the date of this email?

18 A. 6/17/2014.

19 Q. Okay.

20 MR. RAWNSLEY: Move to admit DTX 41 into
21 evidence, Your Honor.

22 MR. MANDEL: No objection.

23 THE COURT: Admitted without objection.

24 (DTX Exhibit No. 41 was admitted into evidence.)

25 BY MR. RAWNSLEY:

Cherry - Cross

1 Q. Please go to DTX 47. And we're going to start at the
2 bottom, once again. Just let me know when you're ready.

3 A. Okay.

4 Q. And this is another email from Mr. DiLillo to
5 Ms. Cottone; correct?

6 A. Correct.

7 Q. And June 17th, 2014; correct?

8 A. Correct.

9 Q. And he identifies himself as an executive assistant
10 at S&P Data; correct?

11 A. Correct.

12 Q. He says that S&P Data is an outsourcing provider;
13 correct?

14 A. Correct.

15 Q. He states that S&P Data has an innovative social
16 media platform; correct?

17 A. Correct.

18 Q. And Mr. DiLillo sent this email again to Key Bank;
19 correct?

20 A. Correct.

21 Q. And if we go up again, this email once again found
22 its way to Plaintiffs; correct?

23 A. Correct.

24 Q. Including you?

25 A. Correct.

Cherry - Cross

1 Q. And if we can go to the top, we see an email address
2 at the very top, JPaine@proskauer.com; correct?

3 A. Sorry. There's a lot of names.

4 Q. Please take your time.

5 A. Oh, yes. Thank you.

6 Q. And we've seen that email address earlier; correct?

7 A. Correct.

8 Q. The news item about the hiring at S&P Data found its
9 way to Ms. Paine; correct?

10 A. Correct.

11 Q. And you do agree that the JPaine@proskauer.com is
12 still Ms. Jessica Paine at Proskauer Rose; correct?

13 A. Correct.

14 Q. Now, I believe I heard you say at the end of your
15 direct testimony that you want to eliminate confusion;
16 correct?

17 A. Correct.

18 Q. But you didn't want to do that in 2014, did you,
19 Ms. Cherry?

20 A. I can't speak to that.

21 MR. RAWNSLEY: No further questions.

22 THE COURT: All right.

23 MR. MANDEL: No redirect, Your Honor.

24 THE COURT: No redirect, you just said? Okay.

25 Thank you, Ms. Cherry, you may step down.

Cherry - Cross

1 By the way, as we're changing things up, Mr.
2 Rawnsley, were you introducing DTX 47?

3 MR. RAWNSLEY: Yes, I move to admit.

4 MR. MANDEL: No objection.

5 THE COURT: Okay.

6 (DTX Exhibit No. 47 was admitted into evidence.)

7 THE WITNESS: Am I finished?

8 Thank you very much.

9 THE COURT: May she be excused or are you
10 planning to --

11 MR. MANDEL: She can be excused.

12 MR. RAWNSLEY: As long as she's not being
13 recalled, that's fine.

14 THE COURT: Okay. So you're free to go.

15 MR. MANDEL: Your Honor, I'm going to hand the
16 podium over to my colleague, Ms. Milov, who is going to do
17 the questioning of our next witness, Kim Boyle, and I'm
18 going to go get her.

19 THE COURT: Okay.

20 MR. MILLER: May I approach to the witness, Your
21 Honor?

22 THE COURT: Yes.

23 DEPUTY CLERK: Please state and spell your full
24 name for the record.

25 THE WITNESS: It's Kimberly Boyle,

Boyle - Direct

1 K-I-M-B-E-R-L-Y B-O-Y-L-E.

2 DEPUTY CLERK: Do you affirm that the testimony
3 you are about to give to the Court in the case now pending
4 will be the truth, the whole truth and nothing but the
5 truth, you do so affirm?

6 THE WITNESS: Yes.

7 KIMBERLY BOYLE, the witness herein, after having
8 been duly sworn under oath, was examined and testified as
9 follows:

10 DEPUTY CLERK: Make sure you speak into the
11 microphone. Thank you.

12 DIRECT EXAMINATION

13 BY MS. MILOV:

14 Q. Good morning, Ms. Boyle.

15 A. Good morning.

16 Q. You currently work for S&P Dow Jones Indices;
17 correct?

18 A. Yes.

19 Q. What is the relationship between S&P Dow Jones
20 Indices and the plaintiff, S&P Global?

21 A. S&P Dow Jones indices is a division of S&P Global.

22 Q. And is S&P Dow Jones Indices sometimes referred to as
23 S&P DJI?

24 A. Yes.

25 Q. So if I use the two, S&P DJI and S&P Dow Jones

Boyle - Direct

1 Indices interchangeably, will you know I'm speaking about
2 the same entity?

3 A. Yes.

4 Q. And in general, what is the business of S&P Dow Jones
5 Indices?

6 A. We calculate and distribute market indexes.

7 Q. What is your current title at S&P DJI?

8 A. I'm the global head of index data.

9 Q. And what are your responsibilities as global head of
10 index data?

11 A. I am -- so I'm responsible for the -- creating the
12 index data product that we distribute to our clients. That
13 includes strategy, pricing, input on contracts, working with
14 our commercial teams, et cetera.

15 Q. How long have you held your current position as
16 global head of index data?

17 A. So I've been part of the index division for about ten
18 years now, and the last six years or so, I've been in this
19 particular role.

20 Q. And what did you do at S&P DJI before your current
21 role.

22 A. So prior to that, it was a role that was related to
23 this one. It was really mostly focused on the product
24 management, less of the commercial, which is part of it now.

25 Q. And what were your responsibilities in the product

Boyle - Direct

1 management role?

2 A. Right. So it was a little bit more focused on the
3 operations on the production side of the indices and just
4 organizing the product into a more sellable form than it had
5 been previously.

6 Q. Have you held other roles at S&P?

7 A. Yes. I've been -- I've been at S&P for -- well, this
8 is my 25th year at S&P, so for the 15 years prior to that, I
9 worked in a different division. The division that's most
10 like where I was before was the S&P Market Intelligence.
11 Mainly in commercial role, sales.

12 Q. And very briefly, what did you do before you joined
13 S&P in terms of employment?

14 A. I was at Reuters for ten years before I came to S&P,
15 and so Reuters is a financial data distribution platform.

16 Q. And could you please turn to PTX 90 in your binder.
17 It would be the first -- first exhibit.

18 And what is this document?

19 A. Right. So this is about -- this is a media kit, an
20 S&P Global media kit.

21 Q. Do you know how this document is used?

22 A. Right. So -- so this document is really an overview
23 of the S&P Global organization. It talks about our breadth,
24 the different divisions, and the focus that each one of
25 those divisions covers.

Boyle - Direct

1 Q. And I'd like to direct your attention to a page
2 that's a little bit more than halfway -- and for time, I
3 placed a tab on it. It has the number in the corner P10364.

4 And what does this portion of the exhibit show?

5 A. Right. So this page gives a pretty concise overview
6 of the -- of the main products that we offer at S&P Dow
7 Jones Indices.

8 Q. And do you know whether the information that is
9 contained in PTX 90 accurately reflects the goods and
10 services being offered by your division?

11 A. Yes.

12 Q. The left-most column is entitled Benchmarking. What
13 is benchmarking?

14 A. Right. So many of our clients use indexes for what
15 they call benchmarking, which is just to say that it's a
16 measure of comparison of how, perhaps, their results as
17 portfolio manager or an investor will compare to the market,
18 with the indexes being the market.

19 Q. And what service does S&P DJI provide related to
20 benchmarking?

21 A. Primarily, our clients subscribe to our index data
22 services in order to -- in order to use our data for
23 benchmarking. They'll use the historical data as well as
24 the current data.

25 Q. How many indices does S&P DJI currently calculate

Boyle - Direct

1 each day?

2 A. We calculate hundreds of thousands. The number is
3 probably about 7- to 800,000 at this point.

4 Q. So we're going to look at some other documents.

5 MS. MILOV: But before I move on, Your Honor,
6 I'd like to offer PTX 90 into evidence.

7 MR. FINEMAN: No objection.

8 THE COURT: Admitted without objection.

9 (PTX Exhibit No. 90 was admitted into evidence.)

10 BY MS. MILOV:

11 Q. If you could please turn to PTX 96 in your binder,
12 please.

13 What is this exhibit?

14 A. So, so this is a group of -- we call them sort of
15 fact sheets which describe several of our indices. This is
16 information that's available on our website and available in
17 PDFs for downloading. This first one covers the S&P 100 and
18 goes on to cover the S&P 500, the S&P 500 Catholic Values,
19 S&P 500 Dynamic Vector, and other of our -- other of our --
20 of our indexes. It describes the methodology and
21 construction and gives information that our users might be
22 interested in.

23 Q. And do you know whether the information contained
24 within the fact sheets accurately contains data about these
25 indices as of February 26th, 2021, which appears to be the

Boyle - Direct

1 date on the bottom of the page?

2 A. Yes.

3 Q. And since we're going to be talking about it a few
4 times today, could you please explain in general terms what
5 the S&P 500 is.

6 A. Right. So the S&P 500 is probably our most popular
7 index. It's an index meant to measure the large cap
8 companies in the United States. So, it's -- it's about 500
9 companies, 505 securities. And they're market cap weighted.

10 MS. MILOV: Your Honor, I offer Plaintiffs'
11 Trial Exhibit 96 into evidence.

12 MR. FINEMAN: No objection.

13 THE COURT: All right. Admitted without
14 objection.

15 (PTX Exhibit No. 96 was admitted into evidence.)

16 BY MS. MILOV:

17 Q. Ms. Boyle what is end-of-day data?

18 A. Right. So we use the term end-of-day data to sort of
19 describe two different things. One is that there's also a
20 realtime or intraday data, so to distinguish those two
21 services. Our end-of-day service is updated once at the end
22 of the day versus the realtime or the intraday, which is
23 updated throughout the day. And the other way that we
24 described it from a product standpoint is that our
25 end-of-day data includes the detailed, underlying

Boyle - Direct

1 information about the constituents and the weights of the
2 index.

3 Q. How can an individual or entity receive end-of-day
4 data from your division?

5 A. Right. So there's several different several
6 different ways. Usually, for an individual to receive that
7 type of information, they would access it, you know, through
8 our -- through our website, certainly, where you can pull a
9 lot of that data. They would also get it through their
10 brokerage accounts, through online portals, through our
11 distribution partners, and we also have some direct
12 services.

13 Q. So you mentioned a brokerage. How might a brokerage
14 use the S&P data?

15 A. Right. So there would be companies like, maybe,
16 Fidelity or Vanguard or E-Trade who, you know, offer portals
17 for investing and they, you know, they make information
18 available about the market in general. It's a common
19 measurement of the success of your investing, so individuals
20 would usually go to their brokerage account and be able to
21 see how the indexes perform.

22 Q. Would you turn to PTX 100 in your binder, please.
23 What is this document?

24 A. So this is a list of our end-of-day subscription
25 customers.

Boyle - Direct

1 Q. And do you know where this document came from?

2 A. Yes, this is -- this would be -- this is just a
3 standard list as part of our finance records.

4 Q. And do you know whether the list in Plaintiffs'
5 Exhibit 100 accurately reflects the S&P DJI end-of-day
6 subscription customers approximately at the time when
7 documents were collected in this action?

8 A. Yes.

9 Q. Do you know if this is a list of all users who
10 received S&P DJI data?

11 A. This is definitely not a complete list of everybody
12 who uses our data. This would just be investment
13 professionals, financial companies who have entered into
14 licenses directly with us to access data. You know, we also
15 make our data available through redistribution platforms, so
16 financial data platforms where we give the right to that
17 platform to share our data broadly with their client base,
18 and so quite a lot of our data is available for users
19 through those platforms, and those -- those platforms are
20 not required to report those users to us and they don't need
21 to have contracts with us.

22 And in addition, we work with other distributors
23 who -- who are not directed at financial professionals but
24 are more for online websites and other kinds of tools, and
25 they also have the right to display our data on their

Boyle - Direct

1 platforms, and they're not required to report who those
2 users are to us.

3 Q. So if we turn in this list in here, appears to be
4 alphabetical. I placed a Post-It for expediency on a page
5 where I see the beginning of a number of Bank of America
6 entities listed.

7 A. Right.

8 Q. How might this type of entity use the S&P data?

9 A. Right. So variety of different ways. They would be
10 using it for their own end investment purposes. They would
11 be using it on their -- on their banking website, on their
12 client portal, on their public website. You know, their own
13 tracking of their performance that they send out in
14 statements to their clients or for their 401Ks or retirement
15 plans that they manage. They would definitely -- they would
16 definitely be fully using the end-of-day data to support all
17 of their client activity.

18 MS. MILOV: Your Honor, I would offer
19 Plaintiffs' Trial Exhibit 100 into evidence at this time.

20 MR. FINEMAN: No objection.

21 THE COURT: All right. Admitted without
22 objection.

23 (PTX Exhibit No. 100 was admitted into
24 evidence.)

25 BY MS. MILOV:

Boyle - Direct

1 Q. Ms. Boyle, I'd like to turn to just one exhibit
2 further, to Plaintiffs' Trial Exhibit 101. What is this
3 document?

4 A. Right. So these are end-of-day index subscription
5 customers who have direct relationships and contracts with
6 us.

7 Q. Do you know where this document came from?

8 A. Yes, this is based on a -- a finance report that we
9 regularly use.

10 Q. And do you know whether the list in Plaintiffs'
11 Exhibit 101 accurately reflects the end-of-day subscription
12 customers with direct contracts when documents were
13 collected in this action?

14 A. Yes.

15 Q. So, this, again, appears to be a list in alphabetical
16 order, and I wanted to direct your attention to a page
17 containing an entry for NYS Teachers Retirement System. Let
18 me know when you find it.

19 Why might an entity like that take a license?

20 A. Right. So we call NYS Teachers Retirement System an
21 asset owner. They have a huge pension fund which is
22 intended for, you know, as part of the compensation plan for
23 New York State teachers. So, the retirement system would
24 subscribe to our data to oversee the investments in their
25 retirement funds and to provide reporting, make financial

Boyle - Direct

1 investment decisions, and to share that information on the
2 results with the teachers or whoever the members of that
3 plan are.

4 MS. MILOV: Your Honor, I would offer
5 Plaintiffs' Trial Exhibit 101 into evidence.

6 MR. FINEMAN: No objection.

7 THE COURT: All right. Admitted without
8 objection.

9 (PTX Exhibit No. 101 was admitted into
10 evidence.)

11 BY MS. MILOV:

12 Q. Ms. Boyle, at the beginning of your testimony, you
13 alluded to, I believe, realtime or intraday. Could you
14 please let us know what that relates to, the end-of-day data
15 you were referencing?

16 A. Right. So the realtime data takes the underlying
17 securities within the index and creates an updated,
18 calculated, ticking version of the -- of the index, which in
19 essence calculates and makes available to the CME for
20 distribution to -- to vendors, to clients, to websites, to a
21 whole range of different portals and outlets. So it's
22 updated daily, you know, second by second throughout the
23 day.

24 Q. So could you please turn to Plaintiffs' Trial Exhibit
25 102 in your binder. And what is this document?

Boyle - Direct

1 A. Right. So this is a list of our intraday clients.

2 Q. Do you know where this document came from?

3 A. Yes, there would be sort of a typical reporting that
4 we receive of the clients who have access to this, so that's
5 what this list is.

6 Q. And do you know whether this list accurately reflects
7 the intraday customers that your division has when documents
8 were reflected in this action?

9 A. Yes.

10 Q. And I'd like to turn alphabetically. I see a few
11 listings here CNBC, CNN, Fox News, New York Times. Why
12 would media companies like these take a license?

13 A. Right. So the S&P 500 and S&P index updates are
14 newsworthy information that these portals and media outlets
15 want to share as part of the newsworthy information that
16 they're making available to their audience on a daily basis.

17 Q. And moving a bit further, I also see Google and Yahoo
18 as licensees. Why would companies like these take a
19 license?

20 A. Right. So similar to the media outlets, these are
21 online portals where people would, you know, frequently
22 check in throughout the day to see how the market is
23 performing, and so through the realtime license, they have
24 the right to show S&P 500 and other S&P indices on their
25 screens. So -- so that people can check them at, you know,

Boyle - Direct

1 at their leisure.

2 MS. MILOV: At this time, I would offer
3 Plaintiffs' Trial Exhibit 102 into evidence.

4 MR. FINEMAN: No objection.

5 THE COURT: Admitted without objection.

6 (PTX Exhibit No. 102 was admitted into
7 evidence.)

8 BY MS. MILOV:

9 Q. Ms. Boyle, in what form does your division offer its
10 index data services?

11 A. Right. So you know, we have a few services where we
12 directly deliver the data out to our clients, and we also
13 have relationships where we distribute the data to our
14 redistribution partners who then make it available on their
15 screens and on their services for, you know, for their users
16 to have access to.

17 Q. And does S&P DJI provide data on an index-by-index
18 basis?

19 A. Right. So typically, we don't make the data
20 available on an index-by-index basis from subscription
21 standpoint. We offer packages of data. So, you know,
22 oftentimes there's a relationship between the indices that
23 we offer together. So, the S&P 500 for example, is offered
24 in our U.S. package, which contains the 400, the 500, the
25 600, the 1500 that they roll up into and, you know, a range

Boyle - Direct

1 of other S&P indices all in one grouping. So, a
2 subscription would give you access to hundreds of indices.

3 Q. Would you please turn to Plaintiffs' Trial
4 Exhibit 109 in your binder. And what is this document?

5 A. Right. So this is revenue numbers from 2011 to 2020
6 for the S&P branded indices.

7 Q. And do you know where this document came from?

8 A. Yes. This would -- this would be finance. It would
9 come out of our finance department.

10 Q. And do you know what territory these revenue numbers
11 relates to?

12 A. Yes, this is U.S.

13 Q. And do you know whether the exhibit accurately
14 reflects the revenue generated from data in the U.S. from
15 2011 to 2020?

16 A. Yes.

17 Q. And based on your review of this exhibit, what
18 conclusions, if any, can you draw about the sale of S&P's
19 data packages in the U.S. during this time?

20 A. I mean, it's an incredible business. It's growing.
21 It's grown tremendously between 2011 and 2020. There's a
22 huge appetite within the U.S. market for S&P indices, and
23 these numbers demonstrate that.

24 MS. MILOV: Your Honor, I would offer
25 Plaintiffs' Trial Exhibit 109 into evidence.

Boyle - Direct

1 MR. FINEMAN: No objection.

2 THE COURT: All right. Admitted without

3 objection.

4 (PTX Exhibit No. 109 was admitted into

5 evidence.)

6 BY MS. MILOV:

7 Q. Ms. Boyle, I'd like you to turn, unfortunately, all
8 the way back to Plaintiffs' Trial Exhibit 90, particularly
9 to the tabbed page. You just let me know once you're there.

10 A. Yeah.

11 Q. And I particularly would like to direct your
12 attention to the column second from the left entitled
13 Intellectual Property Licensing. What does this relate to?

14 A. Right. So people see the S&P 500 on the news every
15 day, and they see the growth of that index and other indices
16 of ours, but, you know, the S&P 500 gets the most -- gets
17 the most fanfare, and they want to invest in it. But it's
18 impractical for an individual to invest in 500 securities
19 and to kind of try, themselves, to keep up with the
20 weighting schemes and whatnot that they would have to in
21 order to track the performance themselves.

22 So, because you can't directly invest in an
23 index, there are products that we license to our clients
24 where we give them the right to track our index in a
25 financial product that can be bought by individuals or

Boyle - Direct

1 professionals. So, ETFs, or mutual funds or annuities can
2 be created to mirror the results of the S&P 500 and other
3 indices, and this is a really important part of our --
4 really the primary part of our business activity, is to
5 enter into these -- call them IP licenses because the
6 financial institution is copying the design of our index in
7 the product that they are then selling to their client.

8 Q. I want to speak a little bit more about those
9 products. Can you please turn to Exhibit 97 in your binder.
10 And what is this exhibit?

11 A. So this exhibit is produced by S&P, and it is showing
12 you all, not all, but long lists of the financial data
13 products that are available in the marketplace to track our,
14 you know, particular indices. So, if you wanted to invest
15 in the S&P 500 directly, this is a list that we provide so
16 that you would know what products are authorized to offer,
17 you know, that sort of tracking. And it goes through the
18 S&P 100, the S&P 500, the S&P 500 Catholic Values, the S&P
19 500 Dynamic Vector, the S&P 500 Low Volatility Index. So
20 there are many indices listed here, and for each page, it
21 lists the financial products that are, you know -- people
22 can just go to to invest in them directly.

23 MS. MILOV: Your Honor, I would move or I'd
24 offer Exhibit 97 into evidence.

25 MR. FINEMAN: No objection.

Boyle - Direct

1 THE COURT: Admitted without objection.

2 (PTX Exhibit No. 97 was admitted into evidence.)

3 BY MS. MILOV:

4 Q. Ms. Boyle, could you please turn to Plaintiffs' Trial
5 Exhibit 99 in your binder. And what is this document?

6 A. So this is a list of our IP clients.

7 Q. And do you know where this document came from?

8 A. Yes, this comes from reporting and from our finance
9 records.

10 Q. And do you know whether the exhibit accurately
11 reflects your IP licensees when documents were collected in
12 this action?

13 A. Yes, it does.

14 Q. And based on this exhibit, can you identify a few of
15 your IP licensees?

16 A. Sure. So, I mean some of our -- some of the, you
17 know, more well-known probably are, you know, Vanguard is --
18 is a huge S&P 500 mutual fund. Schwab has an S&P 500 Fund.
19 State Street, Fidelity, Merrill Lynch, Morgan Stanley.
20 Yeah, there's -- I, mean all well-known financial
21 institutions have these IP relationships with us.

22 MS. MILOV: Your Honor, I would offer
23 Plaintiffs' Trial Exhibit 99 into evidence.

24 MR. FINEMAN: No objection.

25 THE COURT: Admitted without objection.

Boyle - Direct

1 (PTX Exhibit No. 99 was admitted into evidence.)

2 BY MS. MILOV:

3 Q. Ms. Boyle, could you please turn one back to
4 Plaintiffs' Trial Exhibit 98. And what is this exhibit?

5 A. Okay. So this exhibit contains several fact sheets
6 that are -- these are -- these are not produced by S&P.
7 These would be coming off of the partner -- partner websites
8 or client websites. And, so for example, this first one is
9 a description of the Schwab S&P 500 index funds.

10 Q. In general, are you familiar with these products?

11 A. Yes.

12 Q. And since you mentioned the first page, the Schwab
13 S&P 500 index funds, does anything on this page show what
14 the share price was for this fund?

15 A. Yes. So what this is showing you is that to buy one
16 share of this fund, it would be \$58.17 on the day that this
17 is described.

18 Q. And what does the share price represent?

19 A. Right. So that's -- that's showing if, you know,
20 if -- really, if anybody just wanted to participate in the
21 S&P 500 investment with Schwab, they would be able to, you
22 know, get -- make an account and buy a share for \$58.17.

23 Q. So I wanted to turn your direction to about six pages
24 into the exhibit. It has the number P14350 in the lower
25 right-hand corner. And I'd particularly like to focus your

Boyle - Direct

1 attention on the subheading of highlights under the summary.

2 Let me know once you're there.

3 A. Okay.

4 Q. What do you understand these highlights to mean?

5 A. Right. So, I mean, this is really just the key
6 information for the investor. It's a simple way to get
7 access to the 500 leading U.S. companies through buying a
8 single share in, you know, in this particular fund. It
9 gives you the diverse 500 portfolio. It's straightforward.
10 It's low cost, so it's -- it's just giving you that
11 overview.

12 Q. And I wanted to march a few pages forward. It's
13 about three pages forward, the number on the right-hand
14 corner is P14362.

15 A. Yeah.

16 Q. And what is this document?

17 A. All right. So this one describes a different S&P
18 500-based product. This one is an ETF, so an ETF would be
19 an exchange traded fund, so this is something you can just
20 buy like you would buy a share of stock. And it's an
21 iShares funds which is produced by Blackrock. And yeah,
22 this is an overview of -- you know, it's a different
23 investment vehicle, but it's essentially capturing the same
24 investment profile of the S&P 500.

25 Q. And does anything on this page show what the share

Boyle - Direct

1 price was for this ETF?

2 A. Right. So this one was \$66.14.

3 Q. And again, what does that share price represent here?

4 A. So that's the price of one share of the ETF.

5 MS. MILOV: Your Honor, I'd move or I'd offer
6 Plaintiffs' Trial Exhibit 98 into evidence.

7 MR. FINEMAN: No objection.

8 THE COURT: Admitted without objection.

9 (PTX Exhibit No. 98 was admitted into evidence.)

10 BY MS. MILOV:

11 Q. Ms. Boyle, do you know how S&P DJI prices its IP
12 licenses?

13 A. Yeah. So the way that -- the way that we do that is
14 we -- we enter through -- into a contract which gives the
15 firm that we're working with the right to create this
16 investment vehicle, and we agree on a -- really, it's a very
17 small share of the assets that are invested in the funds.
18 So it's, you know, it's an assets under management, is the
19 term that they call it, so we would get a percentage of
20 what's invested in that fund. And that gives the, you know
21 our partner, you know, iShares or whoever, the right to
22 track our index for the makeup of the product, and they
23 handle the regulatory piece of it. They handle all the
24 marketing, all the client communications, you know, and all
25 of, you know, all of the material that gets distributed

Boyle - Direct

1 around about it, so that's kind of how it works.

2 Q. Could you please turn to Plaintiffs' Trial
3 Exhibit 155 in your binder. And what is this exhibit?

4 A. Right. So -- so this is -- this is a document in a
5 marketing material, I guess, that we've been making
6 available for many years now. It's a survey that we send
7 out to the investment community to try and get an idea of
8 how, you know, how many assets are tracking the key S&P
9 indices in the marketplace.

10 Q. Do you know where these documents came from?

11 A. Yeah, this is available on our public website. It's
12 marketing material.

13 Q. And do these appear to be true and correct copies of
14 those annual surveys you were referencing?

15 A. Yes.

16 Q. So, I wanted to show you just a couple of entries on
17 this document. If you look at the first page, the number on
18 the lower right-hand corner is P23063. Can you state what
19 appears to be the total amount of assets under management
20 for S&P index-based financial products.

21 A. Right. So, for 2002, the total was 906,000,140.

22 Q. And roughly what amount of the total assets under
23 management is attributable to the assets under management
24 for the S&P 500-based products?

25 A. That was 840 billion. It was almost 841 billion.

Boyle - Direct

1 Q. So let's fast forward to the second to last page in
2 the exhibit. It has the number P23124 in the lower
3 right-hand corner. And what is the number of assets under
4 management here for just S&P 500-based products?

5 A. So, that is 5.4 trillion.

6 MS. MILOV: Your Honor, I would offer
7 Plaintiffs' Trial Exhibit 155 into evidence.

8 MR. FINEMAN: No objection, Your Honor.

9 THE COURT: Admitted without objection.

10 (PTX Exhibit No. 155 was admitted into
11 evidence.)

12 BY MS. MILOV:

13 Q. Ms. Boyle, could you please turn one exhibit back to
14 Plaintiffs' Trial Exhibit 110. And what is this document?

15 A. So this is revenue from our IP licenses.

16 Q. Do you know where this document came from?

17 A. Yes, this is a finance document from our internal
18 documents from our company.

19 Q. And do you know whether the exhibit accurately
20 reflects the revenue for IP licenses by S&P DJI?

21 A. Yes.

22 Q. What is the -- do you also know, what is the
23 territory covered by this revenue attributable here?

24 A. This is U.S.

25 Q. What is the line item under S&P at the top?

Boyle - Direct

1 A. Right. So S&P, that line, reflects the total of all
2 of the underlying licenses.

3 Q. And at the bottom there's a row titled Other. What
4 is that?

5 A. So, in the listing above Other, you have many of our
6 specific S&P indices, but we have many, many others. And so
7 the Other captures our other S&P indices as well as our
8 select sector indices.

9 Q. So, the select sector indices, those would be
10 presented without use of S&P; correct?

11 A. That's right.

12 Q. And do you know approximately how much of that Other
13 category is related to the select sector indices?

14 A. 25 percent.

15 Q. Reviewing Plaintiffs' Trial Exhibit 110, what
16 conclusions, if any, can you draw from the revenues
17 generated by S&P DJI for IP licenses?

18 A. I mean, you know, there's been tremendous growth, and
19 a tremendous amount of the growth is related to the success
20 of the S&P 500-related IP products.

21 MS. MILOV: Your Honor, I would offer
22 Plaintiffs' Trial Exhibit 110 into evidence.

23 MR. FINEMAN: No objection, Your Honor.

24 THE COURT: Admitted without objection.

25 (PTX Exhibit No. 110 was admitted into

Boyle - Direct

1 evidence.)

2 BY MS. MILOV:

3 Q. Ms. Boyle, other than on data packages or financial
4 products, has the S&P name been promoted to various segments
5 of the public for S&P DJI services?

6 A. Yes. So it's broadly -- it's broadly available and
7 through many different means. You know, your 401K, for
8 example, would have S&P 500 and other S&P indices reflected
9 in it. All of your financial statements would reflect
10 growth versus an S&P index. And in addition to that, we
11 have, you know several, you know, sort of specific
12 activities within our company that are intended to educate
13 and grow the knowledge of our indices, and impact on the,
14 you know, financial economy.

15 So, we have a very strong marketing department.
16 We put a lot of material on our public website. We do a lot
17 of education through that. We offer -- we offer webinars.
18 And then we have teams within our organization whose role it
19 is not to sell our services, but rather educate financial
20 advisors, the insurance community, corporations,
21 municipalities, other asset owners, and just generally make
22 them aware of benefits of using the S&P-branded indices as
23 part of your investment strategy.

24 MS. MILOV: Pending cross-examination, I have no
25 further questions, Ms. Boyle.

Boyle - Cross

1 THE COURT: All right. Mr. Fineman.

2 MR. FINEMAN: Thank you, Your Honor.

3 MR. RAWNSLEY: May I approach, Your Honor?

4 THE COURT: Yes.

5 CROSS-EXAMINATION

6 BY MR. FINEMAN:

7 Q. Ms. Boyle, while you're pouring yourself a cup of
8 water, I'll introduce myself to you. You and I haven't had
9 the pleasure before. My name is Steve Fineman. I'm with
10 Richards, Layton, and Finger. I'm going to be asking you
11 some questions this afternoon.

12 A. It's nice to meet you.

13 Q. It's nice to meet you as well.

14 I think I heard you say this on direct, but I
15 want to confirm. You presently work for S&P Global;
16 correct?

17 A. Well, the division that I work for is S&P Dow Jones
18 Indices, which is part of S&P Global.

19 Q. And the S&P DJI stands for S&P Dow Jones Indices;
20 right?

21 A. That's right.

22 Q. And your division, the S&P DJI, was previously known
23 as the S&P Indices; correct?

24 A. That's right.

25 Q. Your clients and colleagues in the industry still

Boyle - Cross

1 refer to your division mainly as the S&P Indices division;
2 correct?

3 A. That's pretty common, yes.

4 Q. Those same clients and colleagues in the industry
5 actually refer to both your division and the product line
6 your division markets and sells as its S&P indices; correct?

7 A. Yes.

8 Q. And having the division known to the public by two
9 different names, doesn't create any issues, does it?

10 A. I mean, I don't know, probably, what you mean by
11 "issues," but we do offer indices that are branded with S&P
12 and also with DJI, so it's reflective of a range of products
13 that we offer, but I don't think it's confusing.

14 Q. Right. Having the division known to the public by
15 two different names, does not create any issues; correct?

16 A. I don't think so, no.

17 Q. Okay. The S&P Dow Jones Indices division offers four
18 categories of services; correct?

19 A. Yes.

20 Q. And you were talking about those a few minutes ago on
21 direct examination; correct?

22 A. Yes.

23 Q. Those four categories of services are benchmarking,
24 intellectual property licensing, custom indices, and
25 research and quantitative solutions; right?

Boyle - Cross

1 A. Yes.

2 Q. Other than those four categories of services, there
3 are no other categories of services offered by your
4 division; correct?

5 A. Correct.

6 Q. All right. The first category of services you
7 identified is benchmarking; right?

8 A. Yes.

9 Q. And benchmarking describes when an index is used as a
10 comparison against another financial products or portfolios
11 to determine whether the financial product or portfolio is
12 outperforming or underperforming in comparison to the
13 market; right?

14 A. That's right.

15 Q. And the actual service performed is the provision of
16 information which is used by the end subscribers to compare
17 their performance against the index; right?

18 A. That's right.

19 Q. And I'm sorry. You've got to speak up a little bit.

20 A. Sorry. Yes, that's right.

21 Q. Thank you very much.

22 Such information is provided on a subscription
23 basis; correct?

24 A. Yes.

25 Q. And these subscription agreements are contracts with

Boyle - Cross

1 duration of periods of a year or two years; correct?

2 A. Yes.

3 Q. The subscription agreements provide for two manners
4 of redistribution of that information; right?

5 A. I don't know. No. I don't know.

6 Q. Well --

7 A. I don't know what you mean by "two manners of
8 redistribution."

9 Q. Well, sure. The subscription agreements allow for
10 the information that's provided under them to be
11 redistributed, and there's two different ways in which that
12 can happen; right?

13 A. Yes.

14 Q. All right. In the first scenario, S&P Global has a
15 specific agreement that provides a license under which a
16 customer can display the information provided by S&P Global
17 on their terminal or platform for use by the customer's end
18 client; right?

19 A. Yes.

20 Q. In the second scenario, where S&P Global licenses a
21 subscription to a client, like an asset manager or a bank,
22 there is a limited right to use the information provided by
23 S&P Global so the client can provide information to their
24 respective investors or would-be investors; right?

25 A. Yes.

Boyle - Cross

1 Q. In that second scenario that you just testified
2 about, the S&P client can include the information and
3 materials the client places on their own websites or in
4 materials they provide to their clients to show how they
5 perform versus the S&P Global index; correct?

6 A. Yes.

7 Q. All right. Let's discuss for a moment how a party
8 enters into a subscription agreement with S&P Global. Okay?
9 Okay.

10 There is a few ways in which a potential
11 customer obtains a subscription agreement; right?

12 A. Yes.

13 Q. The first way would be to click on the S&P Global
14 website and seek additional information; right?

15 A. They would get information about the services if they
16 were to do that. They wouldn't -- that wouldn't enter them
17 into a license.

18 Q. Exactly. They could go on the website and click, and
19 that would be the first step in gaining information on how
20 to enter into a subscription agreement; correct?

21 A. Yes.

22 Q. Another way would be to use functionality on the
23 systems or platform of one of S&P's existing subscribers
24 that redistributes; right?

25 A. Yes.

Boyle - Cross

1 Q. In that scenario, where a potential subscriber
2 reaches out through the platform of an existing subscriber
3 who redistributes, the existing client would let you know
4 that they have a client who is interested in S&P Global, and
5 then S&P Global would reach out to that potential new
6 client; right?

7 A. That's partially -- that's partially right. There --
8 you know, there's quite a lot of -- of our data that is
9 typically available on a redistribution platform, so there's
10 a certain layer of information that can be made available,
11 you know, without the need for a license. And then a more
12 premium level of information that would, as you described,
13 require that they notify us and that we talk to them about
14 an additional license.

15 Q. The last typical way in which potential subscriber
16 would contact S&P would be a marketing event or a conference
17 attended or hosted by S&P Global; right?

18 A. Yes.

19 Q. At those events or conferences, S&P Global collects
20 information from attendees and then reaches out to the
21 potential clients; correct?

22 A. Very often, yes.

23 Q. S&P Global provides its services to sophisticated
24 institutional companies; correct?

25 A. Yes.

Boyle - Cross

1 Q. And then those sophisticated institutional
2 subscribers would make the S&P Global information available
3 to their retail clients; right?

4 A. Yes.

5 Q. The purpose of providing information to clients that
6 S&P Global licenses is that those clients can use the
7 information to further their relationships with their own
8 clients; correct?

9 A. That -- that's a primary reason. That's not the only
10 reason.

11 Q. Well, that's the end purpose; right?

12 A. Right. But if you looked at something like making
13 the data available to the media outlet or web portals,
14 something like that, it's really just so that they can
15 communicate with their audience, not necessarily as an
16 investment advisor.

17 Q. Right. But the end purpose is to facilitate your
18 clients to facilitate their relationships with their
19 clients; right?

20 A. Yes. Yes.

21 Q. So, for example, a retail customer, the average
22 American consumer would not go to -- to the S&P Global
23 website and enter his or her credit card information and
24 subscribe to S&P Global services; correct?

25 A. Correct.

Boyle - Cross

1 Q. Entering into an agreement with S&P Global is not
2 like signing up for Netflix; correct?

3 A. Correct.

4 Q. Instead, an average consumer would use her or his
5 Fidelity account, E-Trade, Schwab, or other institutional
6 investor who's already an S&P subscriber to compare against
7 the S&P Global indices; right?

8 A. Yes.

9 Q. Average consumers are at least one level removed from
10 dealing directly with Plaintiffs; correct?

11 A. For a subscription, yes. There's quite a bit of free
12 data on our public website, so there is some level available
13 to individual consumers, but to enter into the subscription
14 agreement, then what you described is exactly right.

15 Q. Across S&P Global, average consumers are at least one
16 level removed from dealing directly with Plaintiffs;
17 correct?

18 A. Correct.

19 Q. S&P Global does not directly license the retail user;
20 right?

21 A. Correct.

22 Q. In fact, S&P Global is not licensed to offer
23 investment vehicles; correct?

24 A. Right.

25 Q. S&P's business model is to offer -- offer the indices

Boyle - Cross

1 and then to license the indices to the parties who do offer
2 investment vehicles; right?

3 A. Yes.

4 Q. Let me direct your attention to DTX 124. It should
5 be in the binder that was provided to you immediately before
6 I started to ask you questions. And please let me know when
7 you have that in front of you.

8 A. Yes.

9 Q. All right. And you recognize DTX 124; correct?

10 A. Yes.

11 Q. DTX 124 is a description of the S&P 500 index; right?

12 A. Yes.

13 Q. The information found in DTX 124 is the type of
14 information provided to S&P Global's clients; right?

15 A. Yes.

16 Q. At the bottom of the page on DTX 124, there's a
17 disclaimer that reads in all capital letters, "FOR USE WITH
18 INSTITUTIONS ONLY, NOT FOR USE WITH RETAIL INVESTORS."

19 Isn't that right?

20 A. Yes, it does say that.

21 Q. And can we -- and I'm going to apologize. I'm going
22 to ask you to toggle binders for one moment. Can you please
23 look back at PTX 96, which I believe is a document that you
24 were discussing with your counsel on direct examination.

25 A. Yes.

Boyle - Cross

1 Q. Do you have DTX 96 -- excuse me. I believe this is
2 PTX 96.

3 A. Yes.

4 Q. Do you have PTX 96 in front of you?

5 A. Yes.

6 Q. Do you recall discussing this document when you were
7 on direct examination?

8 A. Yes.

9 Q. And you'll note you were pointing out the date of
10 this document; correct? It was February 26th, 2021?

11 A. Yes.

12 Q. All right. Immediately below that date is a
13 disclaimer that says "FOR USE WITH INSTITUTIONS ONLY, NOT
14 FOR USE WITH RETAIL INVESTORS."

15 Correct?

16 A. Correct.

17 Q. And that's in all capital letters, isn't it?

18 A. Yes.

19 Q. All right. And that disclaimer is consistent with
20 your earlier testimony that S&P Global is at least one step
21 removed from retail investors; right?

22 A. Yes.

23 Q. Let's talk about the second category of products S&P
24 Global offers, and that's intellectual property licensing.
25 S&P works with product sponsors globally so those product

Boyle - Cross

1 sponsors can offer to institutions or retail investors a
2 product -- a product that follows S&P Global indices; right?

3 A. Yes.

4 Q. So in terms of intellectual property licensing, S&P
5 Global's clients are those sophisticated institutions that
6 offer investment vehicles; correct?

7 A. Correct.

8 Q. And I think you might have mentioned this on direct
9 examination, and, for example, some of S&P Global's
10 institutional clients for these licensing products would
11 include Vanguard, State Street, and Blackrock; right?

12 A. Yes.

13 Q. And then those institutions, like Vanguard for
14 example, in turn handle the outreach to clients who want to
15 invest in the product being offered by that institution;
16 right?

17 A. Yes.

18 Q. The next category of product offered by S&P Global is
19 called custom indices; right?

20 A. Yes.

21 Q. And custom indices is constituted in three products;
22 right?

23 A. Yes.

24 Q. The figures type of custom index is when a customer
25 is interested in accessing one of S&P Global's indices but

Boyle - Cross

1 wants to make a change; right?

2 A. Yes.

3 Q. The second type of custom indices is when a customer
4 seeks to have its own brand on an index, and it wants S&P
5 Global to calculate it; right?

6 A. Yes.

7 Q. In those circumstances, S&P Global's merely acting as
8 a calculator and you distribute it back to the customer;
9 right?

10 A. Yes.

11 Q. And the third type of product of the custom indices
12 is a hybrid; right?

13 A. Yes.

14 Q. And under the hybrid approach, that's where an S&P
15 Global customer uses its intellectual property, but the
16 client wants to customize part of the index; right?

17 A. Yes.

18 Q. Let's talk about the fourth category. The fourth
19 category of products is called research and quantitative
20 solutions; right?

21 A. Yes.

22 Q. But research and quantitative solutions is not a
23 commercial product that is offered by S&P Global; right?

24 A. Correct.

25 Q. It's not a -- it's not a commercial product by anyone

Boyle - Cross

1 affiliated with S&P Global; right?

2 A. That's right.

3 Q. Research and quantitative solutions is simply content
4 that S&P Global creates to remain relevant, educate the
5 industry, and increase demands for its services; right?

6 A. Yes.

7 Q. All right. Let's return to the types of agreements
8 that S&P Global enters into with recipients of S&P Global's
9 products. For any S&P Global client that licenses S&P
10 intellectual property, that client enters into an
11 intellectual property agreement with S&P Global; right?

12 A. Yes.

13 Q. Those clients would also enter into a separate data
14 license so they can receive the information necessary to
15 manage their product; right?

16 A. Yes.

17 Q. So they would have at least those two separate
18 agreements; right?

19 A. Yes, usually.

20 Q. There could be additional agreements that they would
21 enter into; right?

22 A. Yes, sometimes. Or there's instances where you would
23 just need the IP agreement and not the data.

24 Q. Let me direct your attention to DTX 150, and that
25 should be in the binder with the other DTX exhibits.

Boyle - Cross

1 A. Yeah.

2 Q. And you recognize DTX 150; right?

3 A. Yes.

4 Q. This is a form template for ETF master agreement;
5 right?

6 A. Yes.

7 Q. Any client looking to acquire rights to S&P Global's
8 intellectual property would be required to enter an
9 agreement in the form of DTX 150; right?

10 A. Yes.

11 Q. Generally, S&P Global offers a master agreement that
12 has a broad set of terms that governs the overall
13 relationship; correct?

14 A. Yes.

15 Q. And that master agreement that an S&P Global client
16 enters into would have schedules that address the specific
17 ETF that's being offered by S&P Global; right?

18 A. Yes.

19 Q. Okay. And since the license does not cover a
20 client's use of the S&P information separately, S&P Global
21 has the client enter into a master subscription agreement
22 and a pricing schedule; right?

23 A. Yes.

24 Q. At S&P Global, you have a team that is referred to as
25 the client coverage team; correct?

Boyle - Cross

1 A. Yes.

2 Q. That client coverage team is responsible for working
3 through the agreements we just talked about with the client
4 or potential client and provide the majority of the
5 information; right?

6 A. Yes, they're the sales -- they're the sales team, so
7 they work with the clients, you know, through the process of
8 concluding that contract.

9 Q. Right. And it's a process; right?

10 A. It can be.

11 Q. Oftentimes, the clients negotiate the terms of the
12 contract; right?

13 A. Yes.

14 Q. And at some point in the process, where the client
15 coverage team is working with the client or potential
16 client, the S&P Global legal team would get involved as
17 well; right?

18 A. Yes, sometimes.

19 Q. Typically, this process of having a client enter into
20 a contract with S&P Global takes weeks to months; right?

21 A. It can, yes.

22 Q. Let me direct your attention to DTX 152. You
23 recognize this agreement; correct?

24 A. Yes. Mm-hmm.

25 Q. DTX 152 is an example of a master agreement for a

Boyle - Cross

1 client to receive the data of an index; right?

2 A. Yes.

3 Q. In addition to this master agreement that's been
4 marked as DTX 152, a client will also need to enter into an
5 index data services attachment and a pricing schedule;
6 right?

7 A. Yes.

8 Q. So for a client who's subscribing to full service,
9 that client would need to enter into at least three
10 agreements; right?

11 A. Yes.

12 Q. Alternatively, a client could access certain S&P
13 Global information from a platform that they would subscribe
14 to; right?

15 A. Yes.

16 Q. But the provider of that platform itself would have
17 had to have entered into a series of agreements, different
18 agreements, with S&P Global; right?

19 A. Yes.

20 Q. Such an agreement would constitute at least a master
21 distribution agreement with an order schedule which would
22 allow the distributor client to share certain S&P Global
23 information with its clients, but also specify what
24 information cannot be shared with its customers without
25 those customers separately entering into a master

Boyle - Cross

1 subscription agreement and pricing schedule license as you
2 just testified about; right?

3 A. Yes.

4 Q. Let's talk about pricing for a few minutes. Let me
5 direct your attention to DTX 153, and before I publish 153,
6 I will say that I conferred with your counsel and inquired
7 to confirm that I can make this publicly available before I
8 did?

9 MR. FINEMAN: And, Counsel, that is correct;
10 right?

11 MS. MILOV: That's correct.

12 BY MR. FINEMAN:

13 Q. And you recognize DTX 153; right?

14 A. Yes.

15 Q. This is a price list for someone entering into a
16 subscription agreement with Plaintiffs; right?

17 A. Yes.

18 Q. And one of Plaintiffs' clients -- if one of
19 Plaintiffs' clients wants to create an investment vehicle
20 based on an index, that client pays basis points on the
21 access of that investment vehicle; right?

22 A. Yes.

23 Q. Those fees can range from anywhere between 10- to
24 50,000 on the low end to at least a hundred thousand; right?

25 A. I'm sorry. Was that -- that's for the IP license?

Boyle - Cross

1 Q. Yes.

2 A. Yes. Yeah.

3 Q. It can go well beyond \$100,000; right?

4 A. It can -- well, there's the basis point relationship,
5 so sort of depends on the investment in the product.

6 Q. Right. And based on those investment points, the
7 amount that the clients pay could be significant; right?

8 A. Yeah.

9 Q. And it can go well over \$100,000?

10 A. Yes. It could.

11 THE COURT: Ms. Boyle, remember to speak up
12 okay.

13 THE WITNESS: Sorry. Yes, it could.

14 BY MR. FINEMAN:

15 Q. And in addition to the fees we've talked about,
16 there's additional fees that clients can incur in connection
17 with their subscription to Plaintiffs' services; right?

18 A. Yes.

19 Q. Plaintiffs -- let's -- we'll stop talking about
20 pricing. Talk about competition.

21 Plaintiffs view companies who specifically index
22 providers and companies who offer indexes as sub-product
23 lines to their primary products to be their competitors;
24 right?

25 A. Yes.

Boyle - Cross

1 Q. Those are the entities that Plaintiffs consider to be
2 their market competitors, companies that offer index product
3 lines; right?

4 A. Yes.

5 Q. And with respect to those companies that only offer
6 indices as a sub-product line, Plaintiffs are not
7 competitors with those companies with respect to their other
8 product lines; right?

9 A. Correct.

10 Q. MSCI is an index provider that Plaintiffs view as a
11 competitor; right?

12 A. Yes.

13 Q. You're familiar with the name S&P Catholic Values
14 Index; right?

15 A. S&P 500 Catholic Values Index.

16 Q. Yes. You're familiar with that; correct?

17 A. Yes. Mm-hmm.

18 Q. The only service that Plaintiffs offer under the name
19 S&P 500 Catholic Values Index is the index itself; right?

20 A. Yes.

21 Q. Okay. Customers or clients for that index do not
22 differ from those customer and client bases that you've just
23 testified about; right?

24 A. I'm sorry. I don't understand.

25 Q. Of course. Let me try this differently. During your

Boyle - Cross

1 cross-examination today, when I was asking you questions,
2 you talked about who were the customers and clients of S&P;
3 right?

4 A. Yes.

5 Q. And you talked about who you viewed to be S&P's
6 competitors; right? Do you recall that?

7 A. Yes.

8 Q. Okay. So with respect to the particular names I'm
9 about to talk to you about, I'm asking you do the potential
10 and existing client customer base or the competitors you
11 described differ for these names that I'm reading to you now
12 than what we already discussed.

13 Do you understand what I'm asking now?

14 A. Yes, I do. No, they don't differ.

15 Q. They're the same customers, potential customers, and
16 the same competitors; correct?

17 A. Yes.

18 Q. And it's the same marketplace for competitors;
19 correct?

20 A. Yes.

21 Q. And other than competitors that you testified to
22 earlier who also provide indices, there are no other
23 competitors for the S&P Catholic Values Index; right?

24 A. No.

25 Q. You're familiar with the name S&P Veqtor; right?

Boyle - Cross

1 A. Yes.

2 Q. And for the court reporter's benefit, that is

3 V-E-Q-T-O-R.

4 The only service that Plaintiffs offer under the
5 name S&P Veqtor is the index itself; right?

6 A. Yes.

7 Q. And again, customers or clients for that index do not
8 differ from those customer and client bases you testified to
9 earlier; correct?

10 A. Correct.

11 Q. And other than the competitors that you testified to
12 earlier who also provide indices, there are no other
13 competitors for the S&P Veqtor index; right?

14 A. No.

15 Q. Okay. I'm going to list some other names, and I'm
16 going to read this list to you, and just let me read them
17 all, and if you don't hear one or you don't remember one,
18 I'll be happy to go back to it. I'm going to try to do this
19 for efficiency purposes.

20 A. Okay.

21 Q. S&P 500 Veqtor. S&P Dynamic Veqtor Index. S&P China
22 500. S&P Composite 1500. S&P GIVI. S&P High Yield
23 Dividend Aristocrats. S&P Prism. S&P Stride. S&P Stride
24 Tips Lockbox. S&P U.S. Retiree Spending Index. S&P WCI.
25 S&P LTVC Global Index. S&P 500 Low Volatility Index, S&P

Boyle - Cross

1 aggregate. S&P 100, S&P 1,000. S&P Mid Cap 400. And S&P
2 Small Cap 600.

3 All right. I know that was a long list, but did
4 you hear all the names I listed?

5 A. Yes.

6 Q. And if you need me to go back, I'm happy to go back
7 individually if you require that, but let me try to address
8 it in one question.

9 For each of the names I just identified, the
10 only service that Plaintiffs offer is the index itself that
11 corresponds to each respective name; right?

12 A. That's right.

13 Q. And the customers or clients of those indices that I
14 just read do not differ from those customer or client bases
15 you testified to earlier; right?

16 A. Right.

17 Q. Other than those competitors that you testified to
18 earlier who also provide indices, there are no other
19 competitors for the list of indices that I just read; isn't
20 that right?

21 A. That's right.

22 MR. FINEMAN: Ms. Boyle, I thank you very for
23 your time today. I have no other questions.

24 THE COURT: Thank you, Mr. Fineman.

25 Ms. Milov?

Boyle - Cross

1 MS. MILOV: No further questions.

2 THE COURT: Can this witness be excused?

3 MR. FINEMAN: Unless she's being recalled, yes,
4 Your Honor.

5 THE COURT: All right. You're free to go.

6 MR. FINEMAN: One housekeeping matter that does
7 not affect Ms. Boyle, but I'd like to move into evidence DTX
8 150, DTX 152, DTX 153, and to the extent I did not, DTX 124.

9 MS. MILOV: No objections.

10 THE COURT: All right. They're all admitted
11 without objection.

12 (DTX Exhibit Nos. 150, 152, 153, and 124 were
13 admitted into evidence.)

14 THE COURT: All right.

15 MR. MANDEL: Your Honor, I don't know what time
16 you wanted to break for lunch.

17 THE WITNESS: One o'clock.

18 MR. MANDEL: One o'clock. Okay. So I'll go get
19 our next witness.

20 THE COURT: Okay.

21 DEPUTY CLERK: Please state and spell your full
22 name for the record.

23 THE WITNESS: Hal, H-A-L, Poret, P-O-R-E-T.

24 DEPUTY CLERK: Do you affirm that the testimony
25 you are about to give to the courts in the case now pending

Poret - Direct

1 will be the truth, the whole truth and nothing but the
2 truth, you do so affirm?

3 THE WITNESS: Yes, I do.

4 DEPUTY CLERK: Thank you. You may sit down.
5 Make sure you speak into the microphone. This is the
6 microphone.

7 HAL PORET, the witness herein, after having been
8 duly sworn under oath, was examined and testified as
9 follows:

10 THE WITNESS: Okay. Thank you.

11 MS. MILOV: Your Honor, may I approach with the
12 binders both for yourself and for the witness?

13 THE COURT: Sure. Yes.

14 DIRECT EXAMINATION

15 BY MS. MILOV:

16 Q. Good afternoon, Mr. Poret. What is your occupation?

17 A. I'm a market researcher.

18 Q. And how long have you been a market researcher?

19 A. About 18 years.

20 Q. Before discussing your research in this case, I'd
21 like to talk to you briefly about your educational
22 background. Could you please summarize it.

23 A. Sure. I have a B.S. in mathematics from Union
24 College which I got in 1993. Then in 1995, I graduated SUNY
25 Albany with a master's in math, and in '98, I graduated

Poret - Direct

1 Harvard Law School with a JD.

2 Q. Can you please describe your professional work
3 experience.

4 A. Yes. I practiced law for about four to five years in
5 a law firm in Boston after I graduated, and then I decided
6 to make a career change and go into survey research, so in
7 2004, I started at a company called ORC International which
8 was a market research and business research company, and I
9 was there from 2004 to 2015 as senior vice president doing
10 survey research. Essentially, designing and conducting
11 surveys for a variety of purposes. And then I left that and
12 started my own company just under my own name, Hal Poret,
13 LLC, in 2016, and I've been doing the same thing since on my
14 own.

15 Q. Okay. What kind of market research have you
16 conducted in your professional capacity?

17 A. All kinds of consumer surveys, surveys, testing
18 companies, websites, and advertising and brands and a number
19 of different things for legal purposes as well.

20 Q. And have these surveys included assessing consumer
21 perceptions of brand and advertising?

22 A. Yes.

23 Q. About how many surveys have you designed related to
24 consumer perception of brands?

25 A. Certainly hundreds.

Poret - Direct

1 Q. What kind of clients have you conducted market
2 research surveys for?

3 A. It's a pretty big variety from, you know, small,
4 medium to large companies in all kinds of areas. I don't
5 have any particular industry specialty. You know, food and
6 beverage, consumer electronics, airlines, apparel, footwear,
7 financial. All kinds of industries.

8 Q. Can you identify any financial industry clients for
9 whom you have conducted market research?

10 A. Yes, some of the ones that I know are public would be
11 Chase, American Express, Bank of California, and a number of
12 other banks and insurance companies and financial companies.

13 Q. Is your market research always conducted in the
14 context of legal disputes?

15 A. No. It's about half doing what you'd call regular
16 corporate market research to help companies make their
17 decisions about their business in advertising and the other
18 half is committed to legal matters.

19 Q. Have you previously submitted surveys related to
20 trademarks in federal district courts?

21 A. Yes.

22 Q. Could you estimate how many trademark surveys you
23 have designed for litigation?

24 A. Probably several hundred.

25 Q. What trademark issues have been addressed by surveys

Poret - Direct

1 you have designed?

2 A. Likelihood of confusion, dilution, genericness,
3 secondary meaning. And also recognition of marks such as
4 fame surveys or surveys going to the strength of a mark.

5 Q. Have you ever been qualified as an expert in survey
6 research by a Federal Court?

7 A. Yes.

8 Q. Have you given testimony as a qualified survey expert
9 in any federal trademark litigations?

10 A. Yes.

11 Q. Have any courts or juries relied on surveys you have
12 conducted?

13 A. Yes.

14 Q. Do any of those include recognition surveys?

15 A. Yes, several of those.

16 Q. Could you please give us an example.

17 A. I had a case where I did a survey testing recognition
18 of the John Deere green and yellow color mark for
19 agricultural equipment, and that was one survey that was
20 relied on by the court to find the fame of that color
21 scheme.

22 Q. Have you published any articles on trademark surveys
23 during your career?

24 A. Yes, I have three articles in The Trademark Reporter,
25 which is the journal of the International Trademark

Poret - Direct

1 Association, and I have a number of other papers and
2 articles that were mainly published in connection with
3 conferences.

4 Q. Are you a member of any trade organizations related
5 to consumer research?

6 A. I am a member of the American Way Association of
7 Public Opinion Research and the New York chapter of that,
8 and I'm also a member of the International Trademark
9 Association.

10 Q. Have you spoken at any conferences on topics related
11 to trademark surveys?

12 A. Yes. I've been the speaker on trademark surveys at
13 the International Trademark Association's annual conference
14 a few times, and I've been asked to speak at conferences
15 from the American Intellectual Property Law Association and
16 some other IP and legal conferences.

17 Q. Could you please open your binder to PTX 158.

18 A. Okay.

19 Q. Is your educational and professional background about
20 which you've just testified summarized in your CV in
21 Plaintiffs' Trial Exhibit 158?

22 A. Yes.

23 MS. MILOV: Your Honor, I offer Plaintiffs'
24 Trial Exhibit 158 into evidence, and I also move to qualify
25 Mr. Poret as an expert in consumer behavior and the design

Poret - Direct

1 and implementation of trademark surveys.

2 MR. FINEMAN: No objection to the introduction
3 of the exhibit, and no objection, Your Honor.

4 THE COURT: All right. So you may proceed, and
5 the exhibit is admitted.

6 (PTX Exhibit No. 158 was admitted into
7 evidence.)

8 BY MS. MILOV:

9 Q. Mr. Poret, what assignment were you given in this
10 case?

11 A. I was asked to design and conduct a study to test the
12 level of consumer recognition of the S&P mark among the
13 general consumer public.

14 Q. You mentioned that you had conducted recognition
15 surveys. About how many have you done previously?

16 A. If you're counting both surveys just in regular
17 corporate market research as well as legal ones, probably a
18 hundred or more.

19 Q. What do -- do you understand to -- to be the
20 relevance of consumer recognition to the claims in this
21 case?

22 A. My understanding has been that for Lanham Act
23 dilution purposes, the standard is that a mark is widely
24 recognized among the general consuming public, so that's
25 been one reason why recognition has been studied, and it's

Poret - Direct

1 also my understanding that recognition can go to -- can be
2 relevant to the strength of a mark and a
3 likelihood-of-confusion analysis.

4 Q. Did you design, supervise, and analyze a recognition
5 survey on Plaintiffs' behalf?

6 A. Yes.

7 Q. What mark did you assess in your survey?

8 A. The S&P mark.

9 Q. What methodology did you use to assess consumer
10 recognition of the S&P mark?

11 A. I used a standard recognition series of questions in
12 which respondents were shown the S&P mark and -- as well as
13 some other marks included to assure the accuracy and
14 reliability of the survey, and they were basically asked
15 whether they had ever seen or heard of that mark as a name
16 of a financial institute.

17 Q. Have you used this methodology before in recognition
18 surveys?

19 A. Yes, many times.

20 Q. Have others used this methodology in recognition
21 surveys?

22 A. Yes, it's very common.

23 Q. Is there any literature discussing appropriate
24 methodology for assessing the recognition or fame of a mark?

25 A. This is discussed in a -- one of the leading

Poret - Direct

1 treatises. It's called Trademark and Deceptive Advertising
2 Surveys. That's published by the ABA, and it's edited by
3 Shari Diamond, who is also the author of the Reference Guide
4 on Survey Research, and Shari Diamond has a chapter in that
5 treatise that discusses dilution surveys and fame for
6 dilution surveys, and it endorses that methodology for
7 measuring recognition. It notes that recognition -- that
8 it's standard to use an aided recognition question like
9 this.

10 Q. Before getting into the details of the design of your
11 survey, can you briefly summarize the results of your
12 survey.

13 A. Yes. The central finding is that S&P was recognized
14 as a name in the financial industry by 67 percent of the
15 survey sample.

16 Q. Let's turn to your actual survey design. In order to
17 assess recognition of the S&P mark, what elements of
18 those -- the survey did you consider?

19 A. Basically, what should be the relevant universe and
20 what methodology to use, what to use as the stimulus or
21 marks that were included, and the questions and the ultimate
22 analysis.

23 Q. So let's take those one at a time, starting with
24 universe. What is a survey's universe?

25 A. It's the population whose state of mind or

Poret - Direct

1 perceptions are relevant to the issues that are being
2 tested.

3 Q. And what is the proper universe for a recognition
4 survey?

5 A. Well, in the context of fame like we talked about,
6 it's the general consuming public, since that's what is the
7 state standard for fame.

8 Q. How did you go about ensuring your respondents fell
9 within this category of the general consuming public?

10 A. I did an online survey, which is the most common type
11 of survey today, and used an online panel from a company
12 called Prodege, P-R-O-D-E-G-E, and had a random
13 representative sample selected from that panel.

14 Q. Have you worked with Prodege before?

15 A. Yes, I worked with them pretty regularly.

16 Q. And why did you select that company?

17 A. Because I've used them many times, and they -- their
18 procedures and their panels and their data quality has been
19 very good, and they are generally considered a leading panel
20 company. Their panel has many millions of Americans, a
21 diverse pool.

22 Q. Did you take any steps to ensure the survey sample
23 was representative of the population by age and gender?

24 A. Yes, I used U.S. Census data and set quotas so that
25 the sample, essentially, matched the demographics of the

Poret - Direct

1 U.S. population.

2 Q. Do you know what the allocation of respondents was
3 among various age groups?

4 A. It was, essentially, something like 45 percent in the
5 youngest age bracket of 21 to 44, I think, and 20 percent in
6 the next group, that I think was 45 to 54. And then it was
7 it was about a third in the oldest age group, 55 and over.

8 Q. Do you know what the allocation of respondents was by
9 gender?

10 A. It was close to even male and female with selecting
11 more female, as is the U.S. population.

12 Q. How many respondents participated in the study?

13 A. 300.

14 Q. Why did you use 300 as the number of respondents to
15 participate in the survey?

16 A. It's a pretty common sample size for a survey like
17 this. It's enough to reliably project the results to the
18 overall population that you're studying.

19 Q. So, let's next get into the details of the
20 methodology you chose. Why did you choose -- strike that.

21 What question did you ask respondents to gauge
22 their recognition of the S&P mark?

23 A. Whether they have ever seen or heard of that as a
24 name in the financial industry.

25 Q. Why did you choose this particular formulation of the

Poret - Direct

1 recognition question?

2 A. Well, it's a pretty standard question to test
3 recognition because you're showing it and you're asking if
4 they've seen or heard of it before, so this type of question
5 has been used a lot of times. And like I said before, since
6 recognition is the standard, it's been endorsed in the
7 literature that using an aided recognition question like
8 that is the standard way to measure this.

9 Q. And why did you ask if respondents had seen or heard
10 of the term in the financial industry?

11 A. Because terms have trademark significance in context,
12 not in the abstract, in other words, in connection with a
13 particular category of goods or services. So I like to use
14 the example of -- of apple, since the term "apple" is
15 obviously a generic term in the context of fruit or it's a
16 nondistinctive, descriptive term if it's, for instance, a
17 flavor of candy. And of course, it's a trademark or brand
18 for consumer electronics. So the context matters in terms
19 of whether somebody recognize recognizes something as a
20 brand. And like I also mentioned before, that same
21 treatise, that Sherry Diamond article, discusses that it's
22 appropriate to use a context to test recognition of a term
23 for a fame survey for that reason.

24 Q. What term or terms did you present to respondents in
25 your survey?

Poret - Direct

1 A. I used -- I presented that -- the S&P term as well as
2 seven other terms that were included in this type of
3 methodology as a way to assure the reliability of the
4 results.

5 Q. Could you please turn to PTX 159 in your binder.

6 A. Okay.

7 Q. And what is this document?

8 A. This is the questionnaire that is -- that I wrote
9 that was used to program the survey online.

10 Q. And I'd like to focus your attention to the section
11 of the questionnaire surrounding Q 230, which is about four
12 pages in. That's the beginning of it, and it runs on the
13 next page. Do you see a listing of the eight marks in the
14 large bold type on the second page following?

15 A. Yes.

16 Q. Are these the marks you used in your survey?

17 A. Yes.

18 Q. So beyond the S&P marks, why did you choose these
19 particular additional names?

20 A. I chose the first five additional ones to have a
21 range of other names that are used in the financial industry
22 that span more well-known ones such as Goldman Sachs and
23 NASDAQ to less well-known ones such as FTSE. And also, I
24 wanted to include several others besides S&P that were
25 acronyms or abbreviations. And then the bottom two were

Poret - Direct

1 included as controls to, again, assure that there's no
2 problems in the survey or in the process that leads to
3 artificially inflated results.

4 Q. So, let's take those in two parts. You said you
5 wanted to provide a range. Why did you want to provide that
6 range?

7 A. Well, it's useful to have other benchmarks that you
8 can use to compare to the result for S&P and also, again, to
9 make sure the survey functions properly and is producing
10 reliable results. For instance, you would expect a lot of
11 people to recognize Goldman Sachs, whereas you would expect
12 less people to recognize a term like FTSE. So it's helpful
13 to see a range of results here for these other terms.

14 Q. And you mentioned providing controls. Can you first
15 explain what a control is.

16 A. Yes, it's a procedure in a survey to measure what you
17 would think of as the noise or false positive level. For
18 instance, in a survey, if you're asking people -- if you're
19 showing people a term and you're asking them whether they
20 recognize this, there could be any number of reasons why
21 somebody says yes, I recognize something even when that's
22 not true. They could be guessing. They could be
23 speculating. They could just be assuming, or there could be
24 something wrong with the survey that just leads people to
25 say yes, I recognize something.

Poret - Direct

1 So a control is included in the survey to
2 account for that and make sure that there's not a problem
3 that's leading to artificially inflated recognition rates.

4 Q. And what was the control in this survey?

5 A. There were two. There was E&K and there was Trouba,
6 T-R-O-U-B-A.

7 Q. And why did you choose those two controls?

8 A. I chose E&K in particular because it has the same
9 structure as S&P in terms of two initials separated by an
10 ampersand, and yet that's a fictional term. It's not
11 actually used as a name in the financial industry. So that
12 is really an ideal way to test whether the survey is simply
13 going to cause people to assume that two initials separated
14 by an ampersand is a real name in the financial industry and
15 to falsely report that they're aware of it even if they
16 couldn't be.

17 And then, it's not actually necessary to have
18 the second control, but I wanted to have as a second one
19 just to be safe, and so for that one, I just picked another
20 name that is, you know, plausible that can, it could be a
21 name of a financial company, but is really not used by one.
22 So that there were two ways to test what this false positive
23 or noise level is.

24 Q. So were you finished with your answer?

25 A. Yes, I was. Thank you.

Poret - Direct

1 Q. Could you please turn to PTX 160 in your binder. And
2 what is this document?

3 A. This is a compilation of the screen shots of what the
4 screens looked like to respondents while taking the survey,
5 although each of these would have been on a -- its own
6 separate screen. This is just fitted onto a piece of paper
7 for convenience.

8 Q. And I'd like to focus your attention on Page 4 of the
9 exhibit surrounding Q 200. There's a header at the top that
10 says Main Survey. Do you see that?

11 A. Yes.

12 Q. Can you please read Q 200 for us.

13 A. Yes. This is the introduction to the main survey,
14 and it said, "For this survey, you will be asked about some
15 names that you may or may not have seen or heard of before
16 in connection with the financial industry. For any question
17 you are asked, if you have no opinion or do not know, please
18 indicate so. Please do not guess."

19 Q. And why specifically did you choose financial
20 industry here?

21 A. I wanted to provide a term to provide context for the
22 reasons we discussed before, that that is -- has been
23 recognized as an appropriate thing to do, since marks are --
24 have significance in a particular context, but I didn't want
25 it to be an overly narrow specific term that would be more

Poret - Direct

1 suggestive. So I picked "financial industry" because it's a
2 very broad term that encompasses many different segments,
3 and so I don't think the term "financial industry" being as
4 broad and general as it is would cue anybody into any
5 particular type of name like something like the S&P 500
6 Index as opposed to, I think, using a more specific thing,
7 like if it had said in connection with financial indices.
8 That, I think, would have been more suggestive to prompt
9 people to recognize a term like S&P. So I think just being
10 broad with the term was more fair and less suggestive.

11 Q. Does the order in which respondents consider the
12 terms you are testing influence their results?

13 A. Yes, that always possible.

14 Q. Did you take any steps to reduce that potential bias?

15 A. I did. I did a couple of things. One of the things
16 I did was I had half of the sample see the term "S&P" first,
17 and that way I would have a large group of data where it was
18 impossible that the other term could influence their
19 perception of S&P because they were asked about S&P before
20 they even saw the other terms. And the other thing that I
21 did is across all of the respondents, the order of all of
22 the other terms was randomized, which also accounts for
23 order bias.

24 Q. Could respondents in your survey go back and change
25 their answers?

Poret - Direct

1 A. No.

2 Q. Could you please turn to PTX 161. And what is this
3 exhibit?

4 A. This is a -- these are tables of the key substantive
5 results from the survey.

6 Q. And I'd also like you to turn in your binder to DTX
7 159. I think we're going to put it up as a native, which
8 will be slightly easier to read. And what is this document?

9 A. This is the raw data file that contains all of
10 respondents' answers to all questions as well as it also has
11 a map that explains what each of these numbers means.

12 Q. And I want to turn back now to PTX 161. What was the
13 result in your survey for S&P?

14 A. It was 67 percent answered that they have seen or
15 heard of S&P as a name in the financial industry, and that
16 also was, essentially, the same result if you looked only at
17 the respondents who saw S&P first so that the other terms
18 could not have influenced their answers about S&P.

19 Q. Could you please walk us through the results for the
20 other noncontrolled terms you tested.

21 A. Sure. So as you can see, Goldman Sachs had
22 88 percent and NASDAQ had 87.3 percent, which were the
23 highest ones. And then HSBC had 64.3 percent. Moody's had
24 41 percent. FTSE had 15 percent.

25 Q. And what were the results for the controls in your

Poret - Direct

1 survey?

2 A. Both of the controls had a one percent rate of
3 recognition.

4 Q. So reviewing Plaintiffs' Trial Exhibit 161, what
5 conclusions, if any, can you draw from this table?

6 A. The main conclusion is that these results are
7 reliable and accurate. First of all, as you look at the
8 names of the other financial industry terms, the pattern is
9 logical and sensible. You have Goldman Sachs and NASDAQ
10 with very high results, and you have other terms with lower
11 results, and most notably, FTSE only has 15 percent. So
12 what this shows is that terms that are not well recognized
13 are not going to get an artificially high result.

14 But probably most importantly the fact that E&K
15 and Trouba each only have one percent of respondents
16 answering that they recognize these is showing you that
17 there's no problem in the survey. There's no
18 misunderstanding of the questions. There's no leading or
19 biased effect of the survey that is just going to cause
20 people to claim to recognize a term that they actually
21 don't. There's just this one percent noise level, which is
22 negligible.

23 And what all that does is it validates that the
24 67 percent result for S&P is accurate and reliable, that it
25 could only happen if the consumers in the survey generally

Poret - Direct

1 genuinely recognized that.

2 Q. Did you implement any quality control measures to
3 make sure the results were reliable?

4 A. Yes. There's a number of measures. For one, the
5 survey is double blind, so no one could have known that S&P
6 was the focus of the survey. There were also a lot of
7 quality control measures within the survey. It's -- in an
8 online survey, you want to make sure people are paying
9 attention, they're reading the instructions and the answer
10 choices, and they are not rushing through the survey too
11 quickly, so there are a number of procedures that address
12 that. There's a CAPTCHA, C-A-P-T-C-H-A that ensures that
13 it's a live person taking the survey and not a computer
14 program. Then there was a requirement of typing in their
15 birth year and gender accurately. And then also entering
16 their age range in the subsequent question, all of those
17 validating that people are paying attention and typing the
18 information accurately and consistently.

19 And then there are two questions that were
20 included during the screening stage, which are things
21 referred to as speed bumps because they are designed to
22 catch people who are rushing through too quickly and not
23 paying attention. One of those was a question that said,
24 "Which of the following social media services have you
25 used?" And that contained a fictional choice in the list,

Poret - Direct

1 which was Hagelin, H-A-G-E-L-I-N, and that's one question
2 that gets people kicked out of the survey if they pick the
3 fictional choice Hagelin.

4 And then the other speed bump comes towards the
5 end of the screener. It's a question where the answer
6 choices say -- they look like a scale. It says strongly
7 agree, agree, and then at the other end, it says strongly
8 disagree. So it looks like it's a question with a scale,
9 but the instruction actually says that we want them to type
10 in the word "other" -- sorry type in the word "survey" into
11 a box next to the word "other." So, it's a really good --
12 what I, again, call a speed bump because if people are
13 rushing through, not paying attention and reading the
14 instructions carefully, they will just see the scale points,
15 and they'll pick one. And then they'll get terminated from
16 the survey. But if they are paying attention and reading
17 the instructions and they type the word "survey" in, then we
18 know they're paying careful attention and taking the survey
19 properly.

20 And then finally at the end of the screener,
21 there's a series of instructions that they're asked to read
22 and agree to. And then there's also a quality control
23 measure that's part of the main survey, which is that every
24 time the respondents were shown and asked about a term on
25 that screen, they could not advance past the screen for at

Poret - Direct

1 least five seconds, so it would have been impossible to just
2 rush through that part of the survey and just quickly click
3 answer choices without looking at the mark or, you know, or
4 considering it.

5 So all of those were quality control measures,
6 in addition to the controls E&K and Trouba that I've already
7 described and the ability to look at the results as we just
8 did and see that there's no sign of any problems.

9 Q. And in the survey context, what does "speeding" refer
10 to?

11 A. It refers to rushing too quickly through a survey,
12 not paying enough attention, not reading carefully, just
13 going through and clicking indiscriminately.

14 Q. And what does "exceeding" refer to in the survey
15 context?

16 A. "Exceeding" refers to -- that isn't used very
17 frequently, but it refers to people who are taking too long
18 to do a survey. In other words, they're exceeding the
19 amount of time you would expect somebody to take for the
20 survey.

21 Q. And either in the implementation or analysis of the
22 results from this survey, did any data from speeders or
23 exceeders affect your results?

24 A. No. I mean, first of all, I think the primary way to
25 account for those things is all of the quality control

Poret - Direct

1 measures that I talked about because those things are a
2 better way of weeding out people who are rushing or not
3 taking the survey properly than trying to judge the amount
4 of time that they took. But I did also end up looking at
5 the recording of how much time each respondent took to take
6 the survey, and I did look at the fact that if you were to
7 kick out the people who took it in the least amount of time
8 or the most, it wouldn't meaningfully change the result.

9 MR. FINEMAN: Your Honor, I'd like to lodge an
10 objection, if that data that Mr. Poret is talking about was
11 never produced.

12 MS. MILOV: To my understanding, I'm not sure if
13 it was ever requested.

14 MR. FINEMAN: Your Honor, I believe it was
15 requested in deposition, and we would have an objection if
16 the witness is testifying as to data that he reviewed and
17 did not produce.

18 THE COURT: And which data is that that we're
19 talking about?

20 MR. FINEMAN: He reviewed data relating,
21 allegedly, to speeding and exceeding, Your Honor, and, Your
22 Honor, I will tell you, I have no objection to reserving
23 this objection, Your Honor, so I am -- until I've completed
24 cross-examination, but I do want to lodge it so as to not
25 waive it, Your Honor.

Poret - Direct

1 THE COURT: Okay. All right. Are you nearly
2 finished the direct?

3 MS. MILOV: Nearly, yes.

4 THE COURT: All right. Well, why don't you
5 finish up and then we'll take lunch.

6 MS. MILOV: Okay.

7 BY MS. MILOV:

8 Q. Mr. Poret, are you familiar with the concepts of
9 pretesting in surveys?

10 A. Yes.

11 Q. And what is pretesting?

12 A. Pretesting is -- basically, means running a portion
13 of the survey and then going back and recontacting some of
14 the people who took it to ask them about their experience
15 with the survey, such as whether they understood the
16 questions or they felt there was any trouble with the
17 survey, and it's something that you could use to help you
18 refine your questions or the survey methodology.

19 Q. And when is pretesting appropriate in the survey
20 context?

21 A. Well, it's not so much a matter of when it's
22 appropriate, but pretesting is very rare for the simple
23 reason that companies are -- conduct thousands and thousands
24 of market research surveys, and there's countless litigation
25 surveys, and most of them use very well-established, heavily

Poret - Direct

1 tested methodologies and questions. So in my 18 years of
2 seeing and doing thousands of surveys, I would say pretests
3 are things that happen, you know, less than one percent of
4 the time because most surveys are using well-tested
5 questions and methodologies that don't need to be reinvented
6 every time they are used again.

7 So pretests are more often used in academic
8 settings and more unusual settings where it's a novel
9 methodology or maybe there's something involved like
10 technology that consumers may have trouble understanding, or
11 maybe there's terminology that's particularly challenging.
12 But in a case like this, where you're asking the type of
13 question that is very simple and straightforward like have
14 you ever seen or heard this name, it's a standard question
15 that I wouldn't need to pretest.

16 Q. Did you take any actions in conducting your survey to
17 ensure that respondents understood the questions as
18 presented?

19 A. Yes. I mean, I always do and did in this case what
20 is really the equivalent of a pretest, which is as I start
21 the survey and it's running and the data is coming in, I'm
22 looking at it, and I have the ability to see is there any
23 sign of any misunderstanding or any problems. And as we
24 talked about it the data, you can see here, you know, this
25 is what I saw from the beginning, that there's no sign of

Poret - Direct

1 any problems. All of these results make sense and there is
2 not a curiously high rate of people claiming to be aware of
3 fictional terms, so the results are really self-validating
4 in the sense that you can see from them that there's no
5 problem with the survey or misunderstanding the questions.

6 Q. And what is "validation" in a survey context?

7 A. Well, the original concepts of validation came from
8 something else when -- back when surveys were more commonly
9 things like mall surveys and you would have 10 or 20
10 interviewers working around the country in different
11 locations stopping people in shopping malls and doing an
12 interview and then sending the results back to the survey
13 designer. There was always the concern that these mall
14 interviewers could be fabricating interviews. They could
15 just be filling out a form and sending it in.

16 So "validation" in that sense used to be or
17 still is when in-person surveys are done that you would call
18 on the phone a number of the people who supposedly took the
19 survey and actually asked them, you know, did you actually
20 take a survey the other day in this mall and did they ask
21 you these questions? So you validated that the survey
22 actually occurred with a real person. But in the context of
23 online surveys, which is more the norm today, the -- that
24 concern over validation doesn't exist because there's no
25 interviewer. So it's not possible that an interviewer

Poret - Direct

1 fabricated an interview or falsified anything because every
2 interview is just self-administered online.

3 So, there's different concepts of validation
4 that take place to online surveys, and it's using data
5 within the survey to validate the identity and
6 characteristics of the person who took it. So like I
7 described before, everybody at the beginning of the survey,
8 after they passed the CAPTCHA, they have to enter the year
9 of birth. They have to enter their gender. And the program
10 knows the year of birth and the gender of the panelists from
11 Prodege, who received the invitation. And so the person who
12 has to type in the birth year and the gender of the panelist
13 to validate that that's who they are. And that's what was
14 done here. That's the standard validation technique for
15 online surveys.

16 Q. And, Mr. Poret, I'd like to ask you one final
17 question, which is looking at Plaintiffs' Trial Exhibit 161,
18 how do you know the results of your survey were reliable?

19 A. Largely because of the control results, but also
20 because of the overall pattern of results, again, that you
21 have what you would expect. Goldman Sachs and NASDAQ have
22 very high results, and there were a number of other terms
23 that had lower results, and the controls only got one
24 percent. And all of that proves that there is nothing about
25 this survey that is biased or flawed that will lead to a

Poret - Direct

1 term getting a result like 67 percent unless that represents
2 genuine recognition.

3 MS. MILOV: Your Honor, we would offer
4 Plaintiffs' Trial Exhibits 159, 160, 161 and Defendants'
5 Trial Exhibit 159 into evidence.

6 MR. FINEMAN: No objection, Your Honor.

7 THE COURT: So I'm not going to take Defense
8 Exhibit 159 unless Defendant actually does something with it
9 because why am I collecting the raw data?

10 If Mr. Fineman brings it up in cross and he
11 wants it in, then I'll put it in, but I don't see any reason
12 why it's necessary at this point, and so I'm against just
13 piling things into the record for no particular reason. So,
14 the rest of them are admitted.

15 (PTX Exhibit Nos. 159, 160, and 161, were
16 admitted into evidence.)

17 MR. FINEMAN: Your Honor, I'll wait to do
18 anything else until after the break.

19 THE COURT: Okay. All right.

20 So, let's have lunch. We'll come back at 2:15.

21 DEPUTY CLERK: All rise.

22 (Luncheon recess was taken.)

23 DEPUTY CLERK: All rise.

24 THE COURT: All right. Let's continue.

25 Mr. Poret, where are you? There you are. Come on up.

Poret - Cross

1 MR. FINEMAN: Your Honor, I think my friends
2 want to address the Court for a minute before I go.

3 THE COURT: Okay.

4 MS. MILOV: Yes, Your Honor. Before Mr. Fineman
5 begins his cross, I did want to make one correction for the
6 record which relates to the request for data. I was not at
7 the deposition, but it was requested, and I had forgotten in
8 reviewing, but to my knowledge, I don't believe any
9 follow-up letters arrived after or any motions, and
10 Mr. Poret's deposition occurred in October of 2021.

11 THE COURT: Okay. All right. Thank. You for
12 correcting the record.

13 And, Mr. Fineman, I take it you're going to
14 proceed and --

15 MR. FINEMAN: We'll see if I can handle it on
16 cross-examination, Your Honor.

17 THE COURT: Okay.

18 CROSS-EXAMINATION

19 BY MR. FINEMAN:

20 Q. Good afternoon, Mr. Poret.

21 A. Good afternoon.

22 Q. My name is Steve Fineman. You and I haven't had the
23 pleasure before, have we?

24 A. I don't think so.

25 Q. Well, it's nice to meet you.

Poret - Cross

1 A. You, too.

2 Q. You've prepared hundreds of survey reports; correct?

3 A. Yes.

4 Q. You've testified in approximately 30 trials; right?

5 A. Yes, I think more than that, but.

6 Q. Approximately 30?

7 A. Yeah, I think that's reasonably close.

8 Q. All right. As of July 2019, you had testified in
9 approximately 200 depositions; right?

10 A. Yes, that's -- that seems right.

11 Q. And by October of 2021, you had testified in
12 approximately 300 depositions; right?

13 A. Yes, I think that's probably right. I don't think
14 that's right, that I had a hundred in two years, but I think
15 it's correct that as of now, I've had 300 or so depositions.

16 Q. Well, I'm going to defer to you on this because
17 you're the one with the degree in mathematics, but if I
18 understand correctly, that means over the last approximately
19 two years, you've testified in depositions a hundred times;
20 is that right?

21 A. No, that's not even close to right. I -- you're
22 right that I would estimate I've had about 300 probably now.

23 Q. Well, if you had 200 in July of 2019 and 300 today --
24 or excuse me, 300 as of October 2021, that delta is a
25 hundred; right?

Poret - Cross

1 A. Yes, but that's not the right math. My CV that was
2 put into evidence before shows the number of times I had
3 testified in between 2019 and 2021, and I -- -- there's
4 about 15 to 20 per year, so -- and in a two-year period,
5 it's roughly 30 to 40.

6 Q. So let me just ask you then: When you -- when you
7 believed that you had testified in depositions 200 times by
8 July of 2019 and you testified that you've testified in
9 depositions approximately 300 times in 2021, in October of
10 2021, which one was wrong?

11 A. I don't even know what testimony you're referring to.
12 I've been asked in all of my depositions how many times, and
13 I've generally estimated it's been a hundred or over a
14 hundred or over 200 or over 300.

15 Q. Well, let's -- can you please -- actually, hold on.
16 Let me hand out some binders first.

17 MR. RAWNSLEY: May I approach, Your Honor?

18 THE COURT: Sure.

19 MR. FINEMAN: One moment, Your Honor. My
20 apologies.

21 THE COURT: It's all right.

22 BY MR. FINEMAN:

23 Q. Do you recall testifying before Judge Andrews in this
24 Court?

25 A. Yes.

Poret - Cross

1 Q. Let's pull up Page 512 numeric in the American Cruise
2 transcript. And that testimony was on January 9th, 2019.

3 Do you recall that?

4 A. I don't recall the date, but I recall the trial.

5 Q. And I believe I might have misspoke. I might have
6 said July instead of January, so I'll correct my earlier
7 statement to January of 2019. And if you would please look
8 at Line 8, do you recognize this as your testimony,
9 Mr. Poret?

10 A. I don't have any doubt that it is. I obviously don't
11 remember this specific dialogue, but I'm sure it is if
12 you're pulling it up.

13 Q. Okay. And you testified that "I have ended up
14 testifying in depositions in about 200 cases." Is that
15 right?

16 A. Yes.

17 Q. And you said today that you've now testified in about
18 300; correct?

19 A. Yes, I think that was about correct.

20 Q. And it appears that your math is off; right?

21 A. No, I think now you're saying it was about 200 in
22 January of 2019 and that it's now March of 2022, so it was
23 about 200 then, and it's about 300 now. I'm obviously --
24 obviously, it's not super easy to estimate off the top of my
25 head how many depositions there are, so maybe when I said

Poret - Cross

1 about 200, maybe it was over 200. Maybe it was 220 or 230
2 at the time and now it's 300, but the only thing I can say
3 with definitive accuracy is that my CV lists every case that
4 I've given testimony in the past four or five years. So if
5 you want to know how many it's been in the past however many
6 years, my CV that was put in before shows the instances of
7 testimony.

8 Q. Right. And to be clear, my question was October of
9 2019 because that's when you were deposed in this case;
10 right?

11 A. I was, yes. That sounds right.

12 Q. So it was October of 2021 that you testified to
13 having given 300 depositions, not March of 2022; right?

14 A. I don't remember. You're asking was my testimony --
15 yes, in either case. I'm estimating a large number over
16 18 years of experience. And if you're asking was I -- could
17 I have been off by 10 or 20 or 30 in estimating at one time
18 or another, sure.

19 Q. Is it fair to say that a large part of your business
20 is performing surveys directed at legal issues?

21 A. Yes.

22 Q. You've performed hundreds of surveys that address the
23 issue of likelihood of confusion in trademark cases;
24 correct?

25 A. Yes.

Poret - Cross

1 Q. You would agree with me that likelihood of confusion
2 is probably the most common legal issue that arises; right?
3 For you?

4 A. Yeah, I would say that's the biggest category of
5 surveys that I'm asked to do in trademark cases.

6 Q. And in fact, you have twice offered an opinion on
7 likelihood of confusion in this court to Judge Andrews;
8 isn't that correct?

9 A. That's -- that certainly seems plausible.

10 THE COURT: I would say only once. Maybe the
11 other one was in front of a different judge.

12 MR. FINEMAN: Your Honor, we'll take a look.

13 THE COURT: Okay. I've only had one trademark
14 trial, so -- and I'm confident in that number.

15 BY MR. FINEMAN:

16 Q. Well, we can agree, sir, that you did testify in this
17 Court and give an opinion on likelihood of confusion at
18 least once; right?

19 A. Yes.

20 Q. And do you recall giving testimony in a case titled
21 GOLO versus Goli Nutrition?

22 A. I certainly did an expert report in that case. I
23 can't remember if I've given testimony, but, yes, I
24 definitely am familiar with that case, and I do believe
25 you're correct that --

Poret - Cross

1 THE COURT: And I'm sorry. We didn't have a
2 hearing in that case.

3 MR. FINEMAN: Your Honor, that's fair.

4 BY MR. FINEMAN:

5 Q. You certainly offered an opinion in a case pending
6 before this judge in the GOLO case; correct?

7 A. Yes.

8 Q. And it was on likelihood of confusion; right?

9 A. Yes.

10 Q. And in connection here with your work on behalf of
11 the plaintiffs in this action, you reviewed the amended
12 complaint; right?

13 A. Yes.

14 Q. As a result, at the time you prepared your opening
15 expert report in this case, you were aware that Plaintiffs
16 were asserting likelihood of confusion and that likelihood
17 of confusion was an issue in this case; right?

18 A. Yes.

19 Q. All right. Even though you reviewed the amended
20 complaint, you did not rely upon the amended complaint or
21 any other documents other than your survey results in
22 forming your opinion in this case; right?

23 A. Yes, I would agree with that.

24 Q. You also did not have any discussions with any Of
25 plaintiffs' employees; right?

Poret - Cross

1 A. Right.

2 Q. And counsel did not supply you with any facts or
3 information that you considered in forming your opinions;
4 right?

5 A. I don't believe so.

6 Q. Okay. And notwithstanding that you knew likelihood
7 of confusion was an issue in this case, that you had
8 performed hundreds of likelihood-of-confusion surveys,
9 including in connection with litigation in this Court, and
10 you retained a vendor to enroll survey participants for a
11 survey, you have not offered and are not offering any
12 opinion in this case as to whether or not there was a
13 likelihood of confusion; right?

14 A. Yes, correct.

15 Q. All right. I'd like to talk to you about a little
16 bit about the vendor you used to assist with the survey.
17 Okay?

18 A. Sure.

19 Q. You retained a vendor to perform some tasks in
20 connection with your survey; right?

21 A. Yes.

22 Q. And that vendor's name is Prodege. Do I have that
23 right?

24 A. Yes.

25 Q. In connection with Prodege's retention in this

Poret - Cross

1 matter, Prodege provided programming and hosting services;
2 correct?

3 A. Yes.

4 Q. In other words, Prodege performed the computer
5 programming to administer your survey; right?

6 A. Yes.

7 Q. Prodege was also responsible for enrolling the survey
8 participants; right?

9 A. Yes. They -- they enrolled them in the first place
10 to have them on the panel, and they also would be handling
11 the sending invitations out, too, that are -- would allow
12 them to come to this particular survey.

13 Q. All right. You don't know how Prodege located the
14 survey participants; right?

15 A. You mean in originally enrolling them --

16 Q. Yes?

17 A. -- on the panel?

18 It's correct that I can't speak exactly to all
19 of Prodege's measures for recruiting people to be on the
20 panel in the first place.

21 Q. And you don't know how many times the participants
22 who provided responses in your survey participated in other
23 surveys; right?

24 A. That's right. And it could be -- obviously, vary
25 from participant to participant.

Poret - Cross

1 Q. Now, Prodege conducted the survey from July 6th, 2021
2 through July 10th, 2021; right?

3 A. I don't have the dates in my head, but if that's what
4 it says, I'm sure that's right.

5 Q. All right. Sitting here today, you don't know?

6 A. Well, I don't have the exact dates in mind, but that
7 seems like generally the time period that it was done.

8 Q. You have in front of you a binder, and that binder
9 should contain a copy of your opening expert report. Would
10 that refresh your recollection?

11 A. As to the specific dates, yes, it would list the
12 specific dates.

13 Q. Could I direct your attention to Page 14 of your
14 July 2, 2021, expert report?

15 A. Yes, I see it. It says July 6th through July 10th.

16 Q. At the bottom of the page under the heading
17 Interviewing Period, it says, "Interviewing was conducted
18 from July 6th, 2021 through July 10th, 2021"; correct?

19 A. Yes.

20 Q. All right. And that does refresh your recollection
21 that the survey was conducted by Prodege between July 6th,
22 2021, and July 10th, 2021; correct?

23 A. Yes.

24 Q. All right. So the respondents expressed their view
25 as to whether they recognized the names subject to the

Poret - Cross

1 survey, including S&P, during that July 6th, 2021, through
2 July 10th, 2021, time period; right?

3 A. Yes.

4 Q. All right. While Prodege hosted the survey and
5 obtained the respondents and handled in the computer
6 programming, you designed the survey; right?

7 A. Yes.

8 Q. Let's talk a little bit about the survey itself.
9 Most surveys that are undertaken are conducted of adults;
10 right?

11 A. Yes, I think that's accurate.

12 Q. And that's because the general consuming public is
13 generally considered to be adults; right?

14 A. It is for a lot of surveys. There are surveys in
15 areas where children are more relevant, but I agree with
16 you. The majority of surveys are among adult populations.

17 Q. Right. And that is because the general consuming
18 public is generally considered to be adults; right?

19 A. It is for the majority of things. Of course, kids
20 are consumers of certain types of goods and services, but I
21 would agree the majority are generally an adult consuming
22 population.

23 Q. When we talk about doing surveys, and we talk about
24 the general consuming public, it's generally considered to
25 be adults; right?

Poret - Cross

1 A. Again, most every survey is done for a specific
2 situation. I agree with you. Most often, the general
3 consuming public is considered adults, but there are, of
4 course, things where children or younger people are
5 consumers.

6 Q. And have you ever previously considered the relevant
7 universe to be ages 18 and over?

8 A. I've done lots of surveys where the relevant universe
9 was 18 and over.

10 Q. Have you ever said before or testified or opined that
11 the relevant universe for the fame study consists of a
12 nationally representative sample of members of the general
13 consuming public age 18 and older? Have you ever said that?

14 A. I've had lots of surveys that were 18 and over, 21
15 and over, so I'm sure I've done so, I'm sure, many times.
16 I've done populations that were 18 and over or as low as 21
17 and over.

18 Q. All right. Do you ever recall having said that?

19 A. I recall -- I've done so many reports and so many
20 surveys, and like I said, I've done many surveys that it was
21 18 and over, so I'm sure in those surveys that I said that
22 18 and over was the population that I surveyed.

23 Q. Let me refresh your recollection. Could you please
24 turn in your binder to the tab that's marked Deere and
25 Company report. And while you're turning, I'm going to ask

Poret - Cross

1 you a question. Do you recall earlier today actually
2 mentioning the Deere and Company survey that you --

3 A. Yes.

4 Q. And why don't you turn to Page 34 of that Deere and
5 Company survey.

6 A. Okay.

7 Q. Now I'm going to direct your attention to Roman II
8 fame survey. You undertook a fame survey in the Deere and
9 Company matter; correct?

10 A. Correct.

11 Q. And did you write that "The relevant universe for the
12 fame survey consists of a nationally representative sample
13 of members of the general consuming public age 18 and
14 older"?

15 A. Yes, and it was.

16 Q. Did you continue and write "This is the proper
17 universe for a fame survey because the Trademark Dilution
18 Revision Act specifies that fame is to be measured among the
19 general consuming public"?

20 A. Yes.

21 Q. You didn't use a survey in this case of 18 and older,
22 did you?

23 A. I did 21 and older in this case.

24 Q. So you did not do a survey of 18 and older; correct?

25 A. Correct. Well, correct, 18-, 19-, 20-year-olds

Poret - Cross

1 are -- were not included in the survey.

2 Q. Fair. Your survey in this case started at age 21;
3 right?

4 A. Yes.

5 Q. Now, do you recall also having designed and performed
6 an online survey to determine whether the mark Vagisil was
7 famous?

8 A. Yes.

9 Q. And in that survey, you used 300 respondents, much
10 like you did in this case, but you used the age of 18;
11 right?

12 A. I don't recall, but if that's what my report says,
13 then I'm sure it was.

14 Q. Well, I don't want you to take my word for it,
15 Mr. Poret. Let me refresh your recollection. If you can
16 turn in your binder to the tab that's marked Vagisil Report,
17 and I'll ask it to be pulled up on the screen. And we can
18 look at Page 6 of the Vagisil report.

19 And let me just ask, is this a report that you
20 authored, sir?

21 A. Yes.

22 Q. And at the top of the page under Study Design, does
23 it read "A total of 300 respondents participated in this
24 online survey among U.S. consumers age 18 and older to test
25 whether or not the mark Vagisil is famous in connection with

Poret - Cross

1 vaginal care products." Is that what it says?

2 A. Yes.

3 Q. Does that refresh your recollection that when you did
4 a fame study with respect to the Vagisil product, you
5 started the survey at age 18; correct?

6 A. Yes.

7 Q. You also designed and performed an online survey on
8 behalf of WeWork where you were surveying whether a company
9 named Regis's HQ marks were famous within the state of Texas
10 or within certain areas of Texas; right?

11 A. Yes.

12 Q. All right. In doing so, you utilized 800
13 participants among residents of Texas who were, again, 18
14 and older; isn't that right?

15 A. I mean, again, the honest answer, I don't remember
16 the sample -- I don't remember the age in that particular
17 survey, but if the report says 18, then that's probably
18 right. But I would also point out I think the reason there
19 were 800 was because I think there were a number of
20 different marks being tested in that, but, yes.

21 Q. All right.

22 A. If that may have been 18.

23 Q. When you say a number of different marks, you're
24 actually referring to different styles of the same HQ mark;
25 right?

Poret - Cross

1 A. I believe that's correct.

2 Q. Right. So it's not the case that you were studying,
3 for example, HQ, PBJ, or something else, it was three or
4 four, whatever it was, different styles of the same mark;
5 right?

6 A. I believe that is accurate.

7 Q. So putting aside the 800 participants for a moment,
8 again, if you don't recall, I'm happy to refresh your
9 recollection. Do you recall whether the study you performed
10 in connection with the WeWork study of the HQ mark included
11 participants 18 and older and not 21 and older?

12 A. What I can honestly say is like I said before. I
13 recall that I've done lot of surveys that were 18 and older,
14 but do I remember that particular one? I don't. But if
15 that's what it says, there's certainly no -- nothing
16 controversial about that.

17 Q. If you turn in your binder to the tab that's
18 marked -- it should be marked WeWork Report. And if you
19 turn to Page 6.

20 And I will say that the first few pages are
21 actually a declaration that you submitted with it. Your
22 report actually starts a few pages in. It's behind
23 Exhibit 1.

24 A. I do see it says 18 and older.

25 Q. Well, on Page 6 of the WeWork report that you wrote,

Poret - Cross

1 it says, "A total of 800 respondents participated in this
2 online survey among residents of Texas age 18 and older to
3 test whether or not the Regis's alleged HQ marks are famous
4 within the state of Texas or within certain areas in Texas;
5 correct?

6 A. Yes.

7 Q. You would agree that most financial services are
8 primarily consumed by adults; correct?

9 A. Yes.

10 Q. If you had included 18-, 19-, and 20-year-olds in your
11 study, those participants, as the youngest participants in
12 the survey, necessarily would have replaced older
13 participants in the study; right?

14 A. I don't know if "replace" is the right word, but yes.
15 I mean, I think what you mean is if I had 300 participants
16 and I included 18-, 19-, and 20-year-olds then, you know
17 there probably would have been ten 18-, 19-, and
18 20-year-olds in the survey and ten older people not in the
19 survey.

20 Q. I'm not sure I heard the last part right, but I think
21 we're saying the same thing. Since the 18-, 19-, and
22 20-year-olds would be the youngest people, anyone they
23 replaced or anyone who they took the place of in the survey
24 would, by definition, be older than them; right?

25 A. Older than them? Yes. Yes.

Poret - Cross

1 Q. Would you agree that a three-year range in your study
2 from 18 to 20 years old would constitute approximately five
3 percent of the survey age range?

4 A. That seems pretty close.

5 Q. And do you believe that the individuals who were
6 closest in age to the 18-, 19-, and 20-year-olds -- well,
7 let me take a step back for a moment. Are you able to read
8 the analytics off your dataset that you produced?

9 A. Yes. If you mean would I know what the numbers mean,
10 probably, yes for most things.

11 Q. Okay. Let's see if -- let's see if I could have
12 showing -- let's see 72. We can pull up the dataset that
13 your counsel introduced, and let me just ask you a couple
14 questions about it.

15 I agree. I don't think we need to introduce it
16 into the record, but I'm going to ask you a few questions
17 about it to see if you can help me.

18 And, Mr. Poret, I will tell you, if you have any
19 concerns about the way that we're manipulating the data
20 through Excel, I have it available on a laptop which is open
21 and ready, and if you need it to manipulate it yourself, I'm
22 happy to provide it to you.

23 A. Okay. Let's see. This seems fine so far.

24 Q. Does this look like your data for the survey
25 participants, but it's been sorted by age starting at the

Poret - Cross

1 youngest? Does this look like yours?

2 A. Yes.

3 Q. And so to help the Court out, in the column that's
4 about four columns in at the top --

5 MR. FINEMAN: And, Judge, I'm going to try to do
6 this very carefully because it's difficult to see all the
7 different data points.

8 BY MR. FINEMAN:

9 Q. At the top where it says 2000 and there are two of
10 them in the columns, that represents the year that that
11 survey participant was born; correct?

12 A. Yes.

13 Q. So there's two survey participants at the top who
14 were born in the year 2000. At the time you did this survey
15 in July 2, 6021, they would have been 21; right?

16 A. Yes.

17 Q. So the top two people would have been the youngest
18 two people in your survey; correct?

19 A. Yes.

20 Q. And 1999, they would have been 22?

21 A. Yes.

22 Q. And those participant would have been the second
23 youngest; right?

24 A. Yes.

25 Q. Can you tell me, based on this data, whether those

Poret - Cross

1 three participants answered yes or no to whether they
2 recognized various names?

3 A. Yes. If you scrolled further to the right in the
4 spreadsheet, I could.

5 Q. Which column is it, sir?

6 A. Yeah, you've gone far. No. No. that's fine. I
7 mean --

8 Q. You're giving me far too much credit. I'm not doing
9 anything, Mr. Poret. But my friend in the hot seat is doing
10 a great job.

11 Which column are you looking at?

12 A. Well, at a minimum, I can see the column that starts
13 AL and it says Q 230_1.

14 Q. Yes.

15 A. That's showing that two of them said that they do not
16 recognize S&P, and one of them said that they do.

17 Q. Okay. So of the -- the three youngest people in the
18 survey -- and again, I'm going to defer to your mathematics
19 here and make sure I get it right. So of the youngest group
20 in there, that are closest in age to that 18- and
21 19-year-old group, only 33 percent of them recognized or
22 answered affirmatively to your question about S&P; right?

23 A. Yes, that's essentially correct. One out of three.

24 THE COURT: So let me get this straight. You're
25 asking him three people. One answered it as opposed to two

Poret - Cross

1 answered it?

2 MR. FINEMAN: As a starting point, Your Honor.

3 THE COURT: Okay.

4 BY MR. FINEMAN:

5 Q. And if we go over -- back to the far left side where
6 the age bracket was, and then the next youngest would be
7 1998; correct?

8 A. Yes.

9 Q. And this is all we have to go from for people who
10 fall into the next closest three-year age bracket; right?
11 This is 21-, 22-, and 23-year-olds; right?

12 A. You have sorted it by age, so you're pointing to the
13 21-, 22-, and 23-year-olds.

14 Q. Right. And I'm saying that those are the sole
15 participants who fall into that age range right?
16 Percentage?

17 A. Yes, correct.

18 Q. So if we go back to the column that we were looking
19 at before, can you tell us how the next four people answered
20 who were, again, in that same three-year age bracket, 21 to
21 23.

22 A. Two said that they know S&P, and two said that they
23 don't.

24 Q. Right. So even so if we take the whole three-year
25 group -- thank you. If we take the whole three-year group,

Poret - Cross

1 we're still below 50 percent as to those who recognized S&P;
2 right?

3 A. Yes, it's three out of seven.

4 Q. Right. And that's about 42 percent; right?

5 A. Yes.

6 Q. And that's the next closest age demographic to the
7 three years age demographic that you omitted; right?

8 A. Yes.

9 Q. We don't have any statistics for participants in the
10 age range of 18 to 20; right?

11 A. No, we don't, but you could assume that they -- that
12 zero of them recognize S&P, and it wouldn't meaningfully
13 change the overall result. So, it's --

14 Q. Well --

15 A. -- it's a pretty negligible -- no matter what it
16 would have been, it couldn't be more than a negligible
17 difference.

18 Q. Well, and perhaps people define "negligible"
19 differently, so let me ask you this: I think we earlier
20 discussed that the 18- to 20-year-olds could form five
21 percent of the age bracket for your survey; right?

22 A. I haven't done that math. I said that sounds vaguely
23 reasonable.

24 Q. Approximately five percent?

25 A. Yes. Again, I think that sounds fine.

Poret - Cross

1 Q. And there were 300 participants in the survey?

2 A. Yes.

3 Q. So, that 18- to 21-year-old could have made up 15
4 participant right?

5 A. Yes, it could have.

6 Q. Who would have had or could have had, based on the
7 demographics for other people close in age to them, a much
8 lower percent of recognition than you reported of
9 67 percent; right?

10 A. It's right that it's possible that a few more young
11 people could have had a lower result than the average, but
12 it's not possible that it could have dragged the overall
13 number down by a very meaningful amount.

14 Q. Well, it could have moved it down by two percent;
15 correct?

16 A. Yeah. That's possible.

17 Q. Okay. So it could be as low as 65 percent if we
18 included 18- to 20-year-olds; right?

19 A. It could be, and it could be a point or two higher,
20 but, yes, I agree with you if you changed -- if you swapped
21 in 10 or 15 respondents of one thing or another, the most it
22 could move it is a percent or two.

23 Q. You're familiar with the term "speeders" in
24 connection with survey responses; right?

25 A. Yes.

Poret - Cross

1 Q. And your counsel asked you a little bit about
2 speeders; right?

3 A. Yes.

4 Q. Speeders are survey respondents that go through a
5 survey too quickly; right?

6 A. Yes. I mean, I think I explained it more than that
7 before, but roughly that's the idea.

8 Q. Well, the problem with speeders is that they -- you
9 don't want respondents going through the survey so quickly
10 that they're not paying attention and providing meaningful
11 data; right?

12 A. Agree.

13 Q. For people not taking the survey properly, such as a
14 speeder, the results could be unreliable; right?

15 A. Yeah, I agree with you. If you deem somebody a
16 speeder, then that means that they're -- that that
17 particular person's result could be unreliable.

18 Q. Right. Let me try again because I think we're saying
19 the same thing, but I want to make sure. For people not
20 taking the survey properly, such as a speeder, the results
21 could be unreliable; right?

22 A. Well, for anybody who is a speeder, the results could
23 be unreliable. Speeders would -- speeders would only --
24 speeders would only hurt that result for S&P, though,
25 because by definition if you're saying somebody's a speeder

Poret - Cross

1 and basically they're not paying attention, that then that
2 basically means that there's a one-third chance that they're
3 going to pick yes, I recognize this.

4 So I mean, I think I already explained all the
5 procedures that I had in place that weeded out speeders, but
6 also am not concerned about the concepts of speeding because
7 speeding creates noise in the surveys. It doesn't lead to
8 one answer choice being picked out at a higher rate. It
9 leads to noise. So if you have a bunch of people randomly
10 speeding through a survey, you'd expect their answers to be
11 distributed randomly, not concentrated on the choice yes, I
12 recognize S&P.

13 Q. You previously described speeding as a survey
14 offense; right?

15 A. Yes.

16 Q. Now, based on having reviewed Dr. Chiagouris's
17 criticism of your report, that you did not address speeders
18 or exceeders, who took too long, you requested data from
19 Prodege and eliminated the fastest five percent and the
20 slowest five percent from the survey results; right?

21 A. Yes, I did, in response to that criticism.

22 Q. And then you were in court today when you heard that
23 that data has not been produced to our side; correct?

24 A. Yes, I heard that.

25 Q. Right. And you had to get that data from Prodege;

Poret - Cross

1 right?

2 A. What I had to get is I had to get them to attach a
3 number of seconds for each respondent, so you could match
4 each respondent with how many seconds they took in the
5 survey.

6 Q. Right. So without that data, our side has no way of
7 determining how many people took an extraordinarily long
8 time or took, you know, milliseconds to complete the survey;
9 right?

10 A. Yes, you would need that data to know that.

11 Q. Right. But you looked at that data, and after you
12 looked at that data, you eliminated the fastest five percent
13 and the slowest five percent from the dataset; right?

14 A. I didn't actually eliminate them. I didn't do that
15 because I think they shouldn't be eliminated. I did it to
16 respond that if you were to eliminate those people, who I
17 don't think should be, that the result you would get would
18 be, I think, two percent lower than the overall result.

19 Q. Right. You performed the analysis that if you
20 eliminated the top five percent in speed and the slowest
21 five percent in speed, what would that do to the overall
22 percent of recognition under your survey; right?

23 A. Yes.

24 Q. And when you did that, it lowered the percentage;
25 correct?

Poret - Cross

1 A. I think it lowered it from 67 to 65.

2 Q. Okay. You conducted a survey that included S&P
3 because you understood there to be an allegation that the
4 S&P mark is famous; right?

5 A. Yes.

6 Q. But you understand that there are a number of marks
7 asserted by Plaintiffs in this litigation; correct?

8 A. Yes, I believe so.

9 Q. You don't recall all the different marks; right?

10 A. Right.

11 Q. And you do not have a separate opinion regarding
12 awareness level of each of those marks; right?

13 A. Right.

14 Q. The survey you conducted included participants from
15 four geographic areas, Northeast, Midwest, South, and West,
16 right?

17 A. Yes.

18 Q. All right. To the best of your knowledge, you did
19 not survey any views regarding the recognition of S&P in the
20 state of Delaware; right?

21 A. There certainly wasn't any particular focus on
22 Delaware. I think Delaware is -- I think Delaware is
23 included in the northeast.

24 Q. You're speculating; right?

25 A. I'm just not remembering off the top of my head what

Poret - Cross

1 Census region it's classified in, but it's in one of those
2 regions.

3 Q. Sitting here today, you don't know of any respondents
4 who were in the State of Delaware; right?

5 A. I don't -- I don't know. I don't know by individual
6 state.

7 Q. You also did not take into -- you also did not take
8 into consideration any aspect of the standards for a
9 dilution claim under Delaware law; right?

10 A. I did not base anything on Delaware-specific state
11 law.

12 Q. You don't even specifically know what the Delaware
13 dilution statute says; right?

14 A. Right. I don't know what it specifically says.

15 Q. In the survey, you did not ask what company or
16 organization used S&P in the financial industry; right?

17 A. Right.

18 Q. You did not ask what goods or services are provided
19 by the company that uses S&P in the financial industry;
20 right?

21 A. Right.

22 Q. You did not ask the participants to identify where
23 the company who uses S&P in the financial industry is
24 located; right?

25 A. Right.

Poret - Cross

1 Q. You did not ask the respondents where they first
2 heard or saw any of the names in the survey used by any
3 company or organization in the financial industry; right?

4 A. Right.

5 Q. You did not ask the respondents when they first heard
6 or saw any of the names in the survey used by any company or
7 organization in the financial industry; right?

8 A. Right.

9 Q. In the survey you designed to test for the awareness
10 and recognition of the S&P mark, your survey, essentially,
11 consisted of one question; right?

12 A. One question per mark, yes.

13 Q. Right. But it was one question; correct?

14 A. Yes. I -- I agree. It's a one-question inquiry.

15 Q. And the question you posed, and I want to make sure I
16 have this right, so let me quote: "Have you ever seen or
17 heard of the following name used by any company or
18 organization in the financial industry?" Was that the
19 question?

20 A. Yes.

21 Q. All right. That's a closed question; right?

22 A. Close-ended, yes.

23 Q. That's a close-ended question; right?

24 A. Yes.

25 Q. You did not ask any open-ended questions in your

Poret - Cross

1 survey; right?

2 A. Right.

3 Q. Open-ended questions can be helpful because it gives
4 people a chance to type in an answer, and you might, for
5 example, find out a respondent is not paying attention;
6 right?

7 A. Yeah. I mean, I had plenty of other quality checks
8 for that, but that is one function that open-ended questions
9 can serve. I mean, that's why you have the open-ended
10 question where people are told to type in the word "survey"
11 in the box to make sure they're paying attention and
12 complying with that instruction.

13 Q. Some people who take surveys are just trying to rush
14 through it, and they'll type in "Google," "Facebook,"
15 "Instagram," things like that; right?

16 A. Yes.

17 Q. And in fact, there are a lot of benefits to asking
18 open-ended questions to make sure people are paying some
19 attention and they're responding to the survey meaningfully;
20 right?

21 A. In some instances, yes, and I agree. That's why I
22 had that other quality control question with an open end
23 that I mentioned.

24 Q. Right. Irrespective of whether questions were
25 closed-ended questions or open-ended questions, you did not

Poret - Cross

1 ask the respondents any other questions after they answered
2 the question as to whether they had ever heard or seen the
3 names identified in the survey used by any company or
4 organization in the financial industry; right?

5 A. You're right. That was the end of the main survey
6 test.

7 Q. The survey format that you used in connection with
8 this litigation is called aided awareness; right?

9 A. I -- I agree, yes. It's aided awareness.

10 Q. There's another type of testing and survey format
11 that is called unaided awareness; right?

12 A. Yes.

13 Q. And it's your position that it is common to measure
14 both unaided awareness and aided awareness in fame surveys
15 for dilution purposes; right?

16 A. I don't know that I'd quite put it that way. I would
17 say in the majority of instances, unaided awareness
18 questions are probably not used. But unaided awareness
19 questions are incredibly common in a lot of contexts and in
20 a lot of surveys, so it is common -- it is common to use
21 unaided and aided awareness questions in a lot of surveys.
22 It really depends on -- unaided questions are useful when
23 you can ask about a narrow specific category so that people
24 can speak to it. Like, if you said, you know, name a
25 breakfast cereal that's come to your mind, that's a narrow

Poret - Cross

1 category which people could answer. But you wouldn't do it
2 if you -- you wouldn't ask people what food products come to
3 your mind and expect people to name breakfast cereals. So
4 unaided questions can be useful, and they are common in a
5 lot of respects, but they measure recall, not recognition.
6 So sometimes they're useful, but they certainly always have
7 to be backed up by aided awareness.

8 Q. Yeah, Mr. Poret, let me bring you back to my
9 question. It is common to perform a fame survey using aided
10 and unaided awareness; right?

11 A. I mean, I don't know how to quantify "common." It's
12 the minority of cases, but I would say there are enough
13 situations where unaided questions will be useful that it's
14 certainly not uncommon.

15 Q. All right. And have you previously said that it was
16 common to use aided and unaided awareness studies when you'd
17 perform a fame study?

18 A. I don't remember exactly what wording that I've used,
19 but I've done, like I said, plenty of surveys that have used
20 unaided and aided. So, I think it's common enough to do
21 both approaches, whichever, you know, is appropriate and
22 works for the right situation.

23 Q. Do you recall we were talking earlier about the
24 report you prepared in connection with the Vagisil product?

25 A. Yes.

Poret - Cross

1 And I know I did have an unaided question in
2 that because that was asking about a very narrow category
3 like, well, what those products are used for. So it's very
4 specific, and it was an area where people could name brands
5 that come to their mind in that product category as opposed
6 to here where, like I said, I didn't want to use something
7 so specific as tell me what financial indices come to your
8 mind. I wanted to keep the category broad as financial
9 industry --

10 Q. Right.

11 A. -- so I didn't think an unaided question would be
12 sensible with trying to keep the category as broad as
13 financial industry because that encompasses so many
14 different things.

15 Q. Right. Thank you for that, Mr. Poret. Do you recall
16 my question was, do you recall our discussion Vagisil
17 report?

18 A. Yes, I do.

19 Q. Can you please turn back to that report in your
20 binder. It's un the tab Vagisil Report. I believe it is
21 the last tab of the first volume.

22 A. I have it.

23 Q. And I'll have it put up on the screen for your
24 benefit as well and for the judge's benefit.

25 Can you please turn to page -- well, let me ask

Poret - Cross

1 you first. This is an expert report that you prepared in
2 connection with litigation pending in the United States
3 District Court for the Eastern District of Virginia; right?

4 A. Yes.

5 Q. And if you turn to Page 5 of the Vagisil expert
6 report, is that your signature above the date?

7 A. Yes.

8 Q. And the date of this report is January 29th, 2019; is
9 that right?

10 A. '18, yes.

11 Q. I'm sorry. Did I -- yes, 2018. I am sorry.

12 So the date of this report was January 29, 2018;
13 correct?

14 A. Yes.

15 Q. Can you turn to Page 6.

16 A. Yes, I'm there.

17 Q. Okay. You were designing a study to study fame;
18 right?

19 A. Yes.

20 Q. And the last sentence of the second paragraph says,
21 "It is common to measure both unaided and aided awareness,
22 as survey respondents cannot be expected to identify all
23 marks that they are aware of on an unaided basis"; right?

24 A. That's explaining why when you have unaided you need
25 to pair it with an aided question, because you can't rely on

Poret - Cross

1 an unaided question on its own to measure recognition
2 because unaided questions mention recall, and you can't
3 expect everyone to identify every brand that is in their
4 consciousness.

5 Q. Right. And if you go to the top of that paragraph,
6 the second paragraph, same page, Page 6 of the Vagisil
7 report, you wrote "The survey followed a common methodology
8 in which both unaided and aided awareness of the Vagisil
9 mark within the relevant product category was measured";
10 right?

11 A. Yes.

12 Q. You didn't clarify that it was only common in certain
13 types of fame studies; right?

14 A. I don't think -- I don't think I said that. I said
15 it's a common methodology, and most reports I use is a
16 common methodology.

17 Q. Well, you were certainly either expressly or
18 implicitly saying that it's a common methodology for a fame
19 study; right?

20 A. Yes, I agree. It's a common methodology for a fame
21 study, and what I did here is a common methodology for a
22 fame study, just like it's common to use Eveready surveys
23 for confusion and it's common to use Squirt surveys.
24 They're both standard approaches that you apply, you know,
25 what is feasible and sensible for the situation. So, yes, I

Poret - Cross

1 agree what I did there was a common methodology and what I
2 did here is a common methodology.

3 Q. And you were in the courtroom earlier today when
4 Judge Andrews was asking about unaided questions; right?

5 A. You mean -- I wasn't here for all of the witnesses.

6 Q. Perhaps you weren't in the courtroom. Let me ask you
7 a question so that we can all clarify with the textual
8 example of an unaided question. Can you please turn to the
9 page, next page of this report, Page 7 of the Vagisil
10 report?

11 A. Yes.

12 Q. All right. On this page, we see an example of an
13 unaided question; right?

14 A. Yes.

15 Q. It says, "Please list all brands of vaginal care
16 products that you have ever seen or heard of. Please be as
17 complete and specific as possible. You may use as many or
18 few of the boxes as you need, or you may select none, the
19 none box, if none come to your mind"; right?

20 A. Yes. That is open-ended.

21 Q. Right. That's an unaided question; right?

22 A. Yes.

23 Q. But you didn't ask a similar question or any other
24 unaided question to, in connection to the S&P mark; right?

25 A. Right.

Poret - Cross

1 Q. And if you turn to Page 23 of this report, you -- on
2 Page 23 of this report, you reported the percent response of
3 the unaided question; correct?

4 A. Yes.

5 Q. And I believe that was 38.7 percent; is that right?

6 A. Yes.

7 Q. Can you please turn the page to Page 24. At the
8 bottom of the page, did you write that "The 38.7 percent
9 unaided result for Vagisil is very high and provides an
10 initial indication that Vagisil is a strong and well-known
11 mark, as it was top of mind for many respondents and the
12 most mentioned mark on an unaided basis"?

13 A. Yes.

14 Q. So, that provided you with a data point for forming
15 your opinion in the Vagisil case; right?

16 A. Yes, that was one of the data points.

17 Q. And before you asked the unaided question of the
18 respondents in the Vagisil engagement, you defined the
19 phrase vaginal care products; right?

20 A. Yes.

21 Q. And I believe that that can be found on Page 7 of the
22 Vagisil report; correct?

23 A. Yes.

24 Q. Okay. So you said to the respondents in your survey,
25 "For this survey, we'd like you to think about vaginal care

Poret - Cross

1 products" -- or excuse me vaginal care products, whether or
2 not you have ever personally purchased those products;
3 right?

4 A. Yes.

5 Q. And then you wrote "When we say vaginal care
6 products, we mean products that are used to address vaginal
7 itching, discomfort, dryness, odor, or other vaginal health
8 care or hygiene issues, including products such as vaginal
9 creams, wipes, sprays, powders, washes, moisturizer, or
10 other items"; right?

11 A. Yes. This goes to what I was explaining before,
12 which is that if you're going have an unaided question, you
13 need to have a specific, narrow context for what the product
14 category is so that you can expect people to name what
15 brands come to mind in that specific category.

16 Q. Okay. In connection with the survey that you
17 performed in this case, you testified about here today, you
18 didn't define for the respondents what you meant by
19 "financial industry"; right?

20 A. Right. Intentionally because the decision that I
21 made in this case to try to be fair and conservative, was to
22 not cue people to say they recognize S&P because they've
23 heard of the S&P 500. So I made an intentional decision to
24 avoid using the narrow category of financial index because I
25 thought that would be more cuing them to recognize S&P and

Poret - Cross

1 by being broad. By using the broad category of financial
2 industry, that would not be cuing people to recognize what
3 S&P is most known for, and that's exactly why I didn't use
4 that approach and used an open-ended question, because I
5 thought in this instance, the more conservative thing to do
6 was to stay away from defining the category narrowly such as
7 saying name the financial indices that come to you.

8 Q. My question was you didn't define "financial
9 industry" in your survey; right?

10 A. That is correct.

11 Q. And you could have defined "financial industry" in
12 your survey in any way you wanted; right?

13 A. I mean, I could do anything I want, but I couldn't do
14 it any way I want without potentially having something that
15 is going to be accused of a bias. So, again, yes, I could
16 have said I will define "financial industry" as, you know, I
17 mean indices or measures of, you know stocks, or
18 commodities, but I was intentionally staying away from doing
19 that.

20 Q. You also could have said "financial industry"
21 includes anything in the universe that touches money, that
22 involves banks, insurance companies, brokerage houses, ATM
23 tellers, the people who go and cash checks. It could have
24 been anything you wanted, no matter how narrow or how broad;
25 right?

Poret - Cross

1 A. Well, it's right that I have the freedom to write it
2 however I want it, but it's not right that that would have
3 been a good way to do it.

4 Q. So you let the respondents each individually try to
5 figure out what was meant by "financial industry"; right?

6 A. No, they didn't have to -- they didn't have to figure
7 anything out. They just had to honestly answer whether they
8 recognized the term "S&P." And by keeping it broad, I was
9 doing less to cue them to recognize S&P or what it's known
10 as as opposed to if I had said, again, you know, do you
11 recognize this as a financial index or said something about
12 measures of tracking the performance of markets. Something
13 like that would have been more likely to cue people to say,
14 "Oh, yeah, uh-huh, I recognize that's what S&P is." So I
15 did it intentionally broadly because that's clearly less
16 suggestive.

17 Q. But you don't know whether the respondents
18 interpreted broadly or narrowly because you don't know how
19 they interpreted it; right?

20 A. I don't know exactly how they interpreted "financial
21 industry," but I know they accurately answered the question
22 of whether they recognized S&P because they -- when they
23 were shown equivalent terms that are fictional and not used
24 in the financial industry, almost everybody said, "No, I
25 don't recognize that." So I know the answer is reliable

Poret - Cross

1 that they recognized S&P as a mark in the financial
2 industry. I just don't know how each individual interprets
3 the words "financial industry."

4 Q. You just said that there were two fictional names
5 included in the survey; right?

6 A. Yes.

7 Q. All right. And I believe, I don't want to put words
8 in your mouth, so tell me if I have this wrong, did you say
9 that you picked Trouba because it could seem like a name in
10 the financial industry?

11 A. Yes, that's one of the reasons, that it could come
12 off as a name. So it could be the name of any investment
13 firm or anything.

14 Q. Well, it's not actually fictional; right?

15 A. Well, it's a real person's last name in the real
16 world, which is why it's plausible as a name.

17 Q. Right. You picked a professional hockey player who
18 plays for the New York Rangers as the name you included for
19 what could be a professional financial institution; right?

20 A. That is the -- where the name came to my mind from.

21 Q. Right. And you included the name of a professional
22 hockey player who plays for the New York Rangers as the name
23 that could be a financial institution; right?

24 A. That is where I got the idea of that name, but the
25 survey results bear out my correct assumption that the

Poret - Cross

1 typical consumer does not know who Jacob Trouba is, and they
2 are not going to see the word "Trouba" in a survey and
3 somehow say, yes, that's the name of a company in a
4 financial industry because I've heard of that New York
5 Ranger player. So the results of the survey that one
6 percent said yes, I recognize that as a name in the
7 financial industry confirms that people do not recognize
8 that as a name that they think is a financial industry name.

9 Q. Right. You don't -- you didn't actually pick that
10 name because it would sound like a financial institution
11 because you've used that name in other surveys; right?

12 A. Yes. Because it is a real last name and, therefore,
13 it is plausible. It's not some ridiculous, made-up term
14 that nobody could possibly think is a name.

15 Q. I mean, you previously used it to substitute as a
16 potential television channel; right?

17 A. I've used it in the quality control question as well
18 because it's -- it's a term that, since it actually exists,
19 I don't think it can be accused of just being an absurd term
20 that people would automatically dismiss as not real.

21 Q. I'm sorry. My question was you've used it as a
22 substitute for a television channel. Yes or no?

23 A. Yes, for the same reason because it's -- it's a
24 plausible name.

25 Q. Now, Mr. Poret, some of these questions I'm asking

Poret - Cross

1 you are yes-or-no questions. I've given you a lot of leeway
2 to expound upon them, but for now on I'm going to ask you if
3 I ask you a yes-or-no question and it can be answered yes or
4 no, I'm going to ask you to answer it yes or no. And your
5 counsel is free to follow up with you as much as they want
6 it if they want to ask you some questions.

7 I'd like you to turn in your binder to the REELZ
8 expert report.

9 A. Okay.

10 Q. Do you recognize that report?

11 A. Yes.

12 Q. Is that a report that you prepared?

13 A. Yes.

14 Q. That's an expert report you prepared in connection
15 with litigation that was pending in the United States
16 District Court for the District of Minnesota; right?

17 A. Yes.

18 Q. Can you please turn to Page 124 of that report.

19 A. Yes.

20 Q. Is that your signature?

21 A. Yes.

22 Q. Is that dated November 20th, 2020?

23 A. Yes.

24 Q. Can you please turn to Page 5 of this report.

25 A. Okay.

Poret - Cross

1 Q. You see there's -- in the middle of the page, there's
2 five number headings?

3 A. Yes.

4 Q. All right. The first heading says that you
5 performed -- you designed and conducted a survey to
6 determine whether Plaintiff's REELZ mark is famous; right?

7 A. Yes.

8 Q. And you defined that as the fame survey?

9 A. Yes.

10 Q. All right. Also, on Page 5 under the heading three,
11 you wrote that you performed a survey to determine whether
12 consumers who encounter the use of REELZ in connection with
13 Instagram's REELZ app feature form an association with REELZ
14 and its mark, such an association between the respective
15 marks being a prerequisite for dilution to occur.

16 Do you see that?

17 A. Yes.

18 Q. You didn't perform that survey in this case; correct?

19 A. Correct.

20 Q. And number five, it says a survey to determine
21 whether consumers who encounter the REELZ mark in connection
22 with Plaintiff's products and services form an association
23 with Instagram's REELZ feature, such an association between
24 the respective marks being a prerequisite for dilution to
25 occur; right?

Poret - Cross

1 A. Right.

2 Q. You didn't perform that survey in this case, either,
3 did you?

4 A. Correct.

5 Q. And those are known as forward association surveys
6 and reverse association surveys respectively; right?

7 A. Yes.

8 Q. All right. Can you please turn to Page 9 of this
9 REELZ report.

10 A. Okay.

11 Q. Can you please look at the second -- or excuse me. I
12 guess it's the third paragraph on Page 9. It starts with
13 "the survey followed." Do you see that?

14 A. Yes.

15 Q. In this report, you wrote again, much like the
16 Vagisil report, the survey followed a common methodology in
17 which both unaided and aided awareness of the plaintiff's
18 mark within the relevant product category, television
19 channels/networks, was measured; right?

20 A. Yes.

21 Q. And at the end of that paragraph, same paragraph, you
22 concluded with it is common to measure both unaided and
23 aided awareness, as survey respondents cannot be expected to
24 identify all marks that they are aware of on an unaided
25 basis; right?

Poret - Cross

1 A. Yes.

2 Q. Can you please turn to Page 30 of this REELZ report.

3 This is another example where you asked an
4 unaided question while performing a fame survey; right?

5 A. Yes.

6 Q. You asked the respondents to please list the
7 television channels/networks that came to your mind. You
8 may use as many or few of the boxes below as you need;
9 right?

10 A. Yes.

11 Q. Then afterwards, you asked the close-ended question
12 which was an aided question that said, "Have you ever seen
13 or heard of a television channel/network with the following
14 name?" Correct?

15 A. Yes.

16 Q. And then if you turn to Page 32, you asked the
17 question "Have you personally ever watched the REELZ
18 channel?"

19 A. Yes.

20 Q. And you also asked on that same page, "What shows or
21 series, if any, can you name that are currently or
22 previously been on the REELZ channel"; right?

23 A. Yes.

24 Q. You did not ask any questions similar to those
25 questions in the S&P survey; right?

Poret - Cross

1 A. I'm not sure what would have been a similar question,
2 so it doesn't seem applicable, but you're correct. There
3 wasn't any follow-up question like that.

4 Q. But you were trying to disprove fame in the REELZ
5 study; right?

6 A. I wasn't trying to do anything. I was trying to
7 measure whether it's famous.

8 Q. You were retained by a party who was trying to show
9 that there was no fame; correct?

10 A. Yeah. That's correct, that the party retaining me
11 wanted to argue no fame.

12 Q. Now, I'm going to ask you to turn to the Deere
13 report, and this is the one that you testified to on your
14 direct examination; right?

15 A. Yes.

16 Q. And we also looked at this for a moment earlier;
17 correct?

18 A. Yes.

19 Q. And this is an expert report that you prepared in
20 connection with litigation pending in the United States
21 District Court for the Western District of Kentucky; right?

22 A. Yes.

23 Q. And can you please turn to pages 21 to 22 of this
24 report.

25 A. Okay.

Poret - Cross

1 Q. At the bottom of Page 21, it says fame survey;
2 correct?

3 A. Yes.

4 Q. So one of the things you were doing in connection
5 with the Deere report was you were undertaking a fame survey
6 again; right?

7 A. Yes.

8 Q. And you asked the respondents "For each product, we'd
9 like to know if you recognize the product as coming from a
10 specific company or brand based solely on the colors of the
11 product. Any company or brand names/logos have been
12 intentionally removed from the products." Right?

13 A. Yes.

14 Q. This is an open-ended question; right?

15 A. No.

16 Q. I'm sorry. This is an unaided question; correct?

17 A. No.

18 Q. You think this is an aided question?

19 A. It's not.

20 Q. Is it aided or unaided?

21 A. It's not a question at all. This survey did not have
22 an unaided question.

23 Q. Okay. You asked the participants if they could
24 identify if the product came from a specific company or was
25 related to a brand name based solely on the colors; right?

Poret - Cross

1 A. What you're showing is an initial instruction. Then
2 the next question was a closed-ended question.

3 Q. All right. Fair. Can you please turn to page --
4 let's look at Page 22. Excuse me. 23.

5 You asked "Please select one of the following
6 options for the product." Beneath the instruction,
7 respondents were shown the image of a tractor, and then they
8 were asked, based solely on the colors, I do recognize it as
9 coming from a company and I can name it; based on the
10 colors, I do recognize the farming company, but I cannot
11 name it; or I don't recognize it; right?

12 A. Yes.

13 Q. Is that an aided question or unaided question?

14 A. It's aided. This is, by definition, an aided survey
15 because the image of the mark is shown above the question.
16 That is, by definition, aided. In other words, no one is
17 being tested whether the mark comes to their mind on its
18 own. The mark is shown in the survey and then they're being
19 asked if they recognize it. So it's, by definition, an
20 aided survey, which has to be the case for something like
21 color because you can't ask somebody to articulate something
22 visual. You have to show them something visual.

23 Q. Right. And on the next page, on Page 24, you ask a
24 question: Based solely on the colors, what company or
25 brands do you think this product is from; right?

Poret - Cross

1 A. Yes, but that was to see if they named John Deere.
2 John Deere wasn't the mark that was being tested whether it
3 was famous. It was the color scheme which was shown to
4 them.

5 Q. Right.

6 A. So there was no unaided question in this measuring
7 unaided awareness of the green/yellow color scheme, which
8 was the mark.

9 Q. Right. And in this case, you could have asked a
10 follow-up question and said: When you said if you ever
11 heard of or had heard or seen of S&P in connection -- used
12 by any company, you said what company; right?

13 A. You're asking could I have said what is the name of
14 the company that --

15 Q. You heard or saw it used in connection with, yeah.

16 A. Well, I suppose that's possible, but that didn't
17 strike me as a useful question because presumably a lot of
18 people would have said "S&P" and not been able to articulate
19 whatever the official name of the company is. So it seemed
20 very rational to have, when people are looking at a green
21 tractor, to see if they were identifying it as Deere. But
22 if people are being shown the mark S&P to say what company
23 uses that, they're probably going to say S&P. It doesn't
24 seem very useful.

25 Q. You also could have asked what products or services

Poret - Cross

1 does the company you're thinking of offer; right?

2 A. You could ask any question that you think was useful.

3 That seemed like those are very difficult questions for
4 people to articulate answers to, but, yes, you could ask
5 anything that you would like to.

6 Q. All right. I'm not asking about anything I'd like
7 to. I'm asking a very specific question. You could have
8 very easily have asked the respondents to identify any
9 products or services that they're aware of that are
10 associated with the company they were thinking about when
11 they responded; right?

12 A. You could ask that question. I didn't think that
13 that would be able to produce clear answers that would be
14 able to be relied on to try to then discern exactly what the
15 respondent is thinking when they give those answers.

16 Q. Well, if the respondent said they make hockey pucks,
17 you'd know that that person probably doesn't recognize S&P,
18 wouldn't it?

19 A. I would agree that would be a strange answer that I
20 would be suspicious of.

21 Q. And if that person said, "Oh, I know S&P. They gave
22 me tax advice last year," that would tell you they're not
23 thinking of S&P the plaintiffs in this case; right?

24 A. Some of those things might be true, but I think the
25 controls do a better job of scientifically accounting for

Poret - Cross

1 that than to try to interpret open-ended answers because
2 inevitably what you would really get if you ask questions
3 like that is you would get a lot of vague answers that
4 relate to financial things that would be hard to interpret.
5 And having the controls is a much better way to assure that
6 people are not just arbitrarily guessing or making false
7 assumptions or speculations.

8 MR. FINEMAN: Your Honor, I also -- I want to
9 say I'm happy to stop at any point when Your Honor wants to
10 take the afternoon break. I've still got a fair number
11 more.

12 THE COURT: I guess you're familiar with the law
13 of diminishing returns.

14 MR. FINEMAN: I am.

15 THE COURT: All right. Well, keep going. We'll
16 take a break at about quarter of four.

17 MR. FINEMAN: That's fine, Your Honor.

18 BY MR. FINEMAN:

19 Q. Can you please turn to the expert report that's King
20 of Pop?

21 A. Yes.

22 Q. And this is an expert report you prepared; right?

23 A. Yes.

24 Q. And this one, this report, King of Pop is more
25 similar to the survey you did in this case; correct?

Poret - Cross

1 A. That seems right, off the top of my head.

2 Q. In the King of Pop survey, if you look at Page 7, you
3 asked the following question: Have you ever heard or seen
4 the following words or phrases used to identify any person
5 or organization; right?

6 A. Yes.

7 Q. And then on Page 8, you can see that you showed the
8 respondents six names, including a particular fictitious
9 name, at least one; right?

10 A. Yes.

11 Q. But then you asked another question; right?

12 A. You can show it to me. I don't remember.

13 Q. Sure. Can you turn to Page 10, please.

14 A. Oh, yes. I asked people "Who does the phrase 'King
15 of Pop' identify" to see if they would say Michael Jackson.

16 Q. Right. Because that would tell you that the people
17 who identified King of Pop know that King of Pop responds to
18 Michael Jackson; correct?

19 A. Yes, that is correct. That's why I asked.

20 Q. And when you did that, the percentage dropped a fair
21 amount; correct?

22 A. Again, I'll have to look at the numbers. It looks
23 like 85.8 percent said that they have heard or seen of King
24 of Pop, and then 73 percent were able to identify Michael
25 Jackson. But I wouldn't necessarily call that the

Poret - Cross

1 percentage dropping because it is legitimate to recognize a
2 phrase or a source but not actually know who it comes from.
3 So people who said yes, I recognize King of Pop, but can't
4 remember who the artist is, that doesn't -- that doesn't in
5 and of itself delegitimize their answer. It's just a
6 different level of recognition.

7 Q. Right. So the people who identified S&P as something
8 that they had heard or seen used by a company or name,
9 doesn't mean that they know that S&P is the source of
10 whatever service and products they provide; right?

11 A. But it doesn't -- somebody recognizing S&P doesn't
12 mean they know the official corporate name or identity of
13 the company or that they can name what specific services
14 they provide. People probably have a lot of different
15 levels of knowledge, but recognition of a mark does not
16 necessarily mean you know the name of the company or exactly
17 everything that they do.

18 Q. And if you can now turn --

19 MR. FINEMAN: And, Your Honor, this will be my
20 last report.

21 BY MR. FINEMAN:

22 Q. If you can please turn to the one marked WeWork.
23 This is also an expert report you prepared; correct,
24 Mr. Poret?

25 A. Yes.

Poret - Cross

1 Q. All right. And you prepared this in connection with
2 litigation that was in the United States District Court,
3 Northern District of Texas, Dallas Division; right?

4 A. Yes.

5 Q. And in the WeWork matter, you were retained to design
6 and conduct a survey to measure the extent to which, if at
7 all, Regis's claimed HQ marks are famous within the state of
8 Texas generally or within particular areas of Texas; right?

9 A. Yes.

10 Q. All right. The party who retained you was attempting
11 to show that the mark HQ was not famous; right?

12 A. Yes, that is a right.

13 Q. And just so we're clear, the Texas antidilution
14 statute, that mark is considered to be famous if the mark is
15 widely recognized, is the same as the Lanham Act except it
16 narrows the geographic scope to Texas; right?

17 A. I'm not sure, but that sounds close enough to my
18 memory. I don't want to speak to my knowledge of the Texas
19 state law, but that sounds close enough to what I would have
20 thought.

21 Q. Can you turn to Page 6 of this report just to refresh
22 your recollection.

23 On Page 6 of this WeWork report, you wrote what
24 you understood the Texas antidilution statute to be, and as
25 you look at it now, my question to you is: That was

Poret - Cross

1 correct; right? The Texas antidilution that you were doing
2 a fame survey for was effectively the same or close to the
3 Lanham Act except it's geographically different?

4 A. It looks very similar to what it says.

5 Q. So you were undertaking a fame survey, the same as
6 you would for a claim under the Federal Lanham Dilution Act;
7 right?

8 A. Well, there were some differences relating to the
9 states and localities, but I generally agree the concept of
10 the survey is similar.

11 Q. Right. Other than you were trying to get, for
12 example, four corners of Texas geographically like you were
13 getting four areas of the United States, everything else was
14 the same; correct?

15 A. I don't know about everything, but I agree with you
16 that the concepts of measuring fame is a similar concept.

17 Q. All right. And in the WeWork survey, you showed the
18 respondents the HQ mark, so again, it was a two-letter mark;
19 right?

20 A. Yes.

21 Q. And you showed that mark along with two other names,
22 IBM and a fictitious name; right?

23 A. Again, I can't say I remember every detail of surveys
24 from that long ago, but that's what it says in here, I'm
25 sure.

Poret - Cross

1 Q. If you turn to Page 10, I think that it can probably
2 refresh your recollection. Here you have the IBM mark and
3 the ZJ mark; right?

4 A. Yes.

5 Q. Okay. So you agree you were showing the respondents
6 the HQ mark, which was the mark in question, then IBM, which
7 we all know is the real mark, and a fictitious mark; right?

8 A. Yes.

9 Q. And on Page 8, you gave an instructions with respect
10 to the names. You said for each one, we'd like to know
11 whether you have ever seen or heard of it used as a brand or
12 company name in connection with any services or products;
13 right?

14 A. Yes.

15 Q. You then posed to the participants the following
16 question: With respect to the names, have you ever seen or
17 heard of the following used as a brand or company name in
18 connection with any services or products; right?

19 A. Yes.

20 Q. Now, that's a little bit different than the question
21 you asked here; right?

22 A. Yes.

23 Q. Because here, it says used as a brand or company
24 name, and here you said used by a company; right?

25 A. Yes.

Poret - Cross

1 Q. But otherwise, it's a very similar question; right?

2 A. It's -- yes, it's similar.

3 Q. And you believe that question provided a reliable
4 initial measurement of the extent to which the participants
5 believed they recognized HQ in connection with any services
6 or products; right?

7 A. Yes.

8 Q. The participants who did not answer affirmatively
9 with, "yes, I have," when asked whether they have seen
10 or heard of the HQ mark do not recognize it; right?

11 Let me re-ask it.

12 A. Do not recognize it?

13 Q. Let me ask that differently. The participants had
14 the ability to say they recognized it or they didn't; right?

15 A. Yes.

16 Q. All right. All the participants who answered that
17 they had seen or heard of HQ as a brand or company name were
18 asked an additional series of questions to determine whether
19 they were thinking of Regis' HQ, another company's use of
20 HQ, or merely guessing or racing; right?

21 A. Yes.

22 Q. And this is precisely what I was asking you earlier,
23 isn't it, that you could have asked a question just like
24 that to determine whether the people who answer
25 affirmatively in recognition in this survey? Isn't that

Poret - Cross

1 exactly what I was asking you earlier?

2 A. Yes, and I answered you earlier as to why I didn't
3 think that made sense in this instance.

4 Q. Right. So for this two-letter mark in this case when
5 you were retained to disprove fame, you didn't -- you asked
6 several follow-up questions. And in this case, where you
7 were trying to show that it was widely known, you didn't ask
8 any follow-up questions that might have lowered the rate of
9 percent people who recognized it and associated it with
10 Plaintiffs; right?

11 A. I don't agree with all of that. I agree you've -- I
12 agree that there's some -- you've pointed to a number of
13 different surveys that have been both for the plaintiff or
14 for the defendant, and they've involved different products
15 and service categories, and I've done what I did that fit
16 each specific situation, which is what I do in hundreds of
17 surveys. So if you had 300 of my reports here, you'd have
18 300 slightly different surveys, but I disagree with the
19 suggestion that it has anything to do with who's for the
20 plaintiff or who's for the defendant. The reason that I
21 didn't think the follow-up question would be useful here is
22 because I don't think people who are asked what company do
23 you think uses S&P or can you describe their services would
24 be able to give answers that are articulate enough to then
25 classify them as whether or not they're correctly

Poret - Cross

1 identifying the plaintiffs' name or category of services.

2 Q. Right. Can you go to Page 12, please, of this
3 report. You also asked -- and you'll see it at the top of
4 the page. You wrote "What company uses the following as a
5 brand or company name, if you know?" Right?

6 A. Right. Because in that case, HQ is not the name of
7 the company. The name of the company was Regis. So if
8 somebody did know the service as Regis's HQ service, they
9 would easily be able to say that the company is called
10 Regis. Whereas here, the mark is S&P, so to ask somebody
11 what company uses S&P and have them then answer S&P is a
12 useless answer.

13 Q. Okay. The next question says: "What services or
14 products are offered in connection with the following name
15 or logo, if you know?" Right?

16 A. Right. Again, because that was a case where the type
17 of service that they offered would be easy to identify
18 because they offer one core service, whereas the plaintiff
19 here offers a number of different services, and they are --
20 there are financial things that are not easy to articulate.
21 So my expectation is people would have said S&P offers, you
22 know, things in the market or finance or things like that.
23 So I just didn't think that that, in this instance, was
24 going to be a way to get open-ended answers that are clear
25 and able to be classified as opposed to some of these other

Poret - Cross

1 things.

2 Q. Right. Last, the participants were asked what else,
3 if anything, do you know about the company that uses the
4 following as a brand or company name? Right?

5 A. Yes.

6 Q. And again, that's not a question you asked here;
7 right?

8 A. Right.

9 Q. And that last question, according to you, gave the
10 participants a final opportunity to give any answer that
11 could indicate that they were specifically thinking of
12 Regis's HQ; right?

13 A. Yes.

14 Q. You believe that the participants were actually
15 thinking of Regis when answering that they recognize HQ,
16 they would be able to indicate so by giving a response that
17 identifies Regis or its type of services, these questions;
18 right?

19 A. It's correct in that case I thought that if somebody
20 was thinking of the Regis HQ service that was at issue and
21 they said I recognize HQ that they would either be able to
22 say that is a service from Regis or that that is a office
23 rental service or a co-working-space service. I thought
24 yes, somebody should be able to articulate that specificity
25 in that case.

Poret - Cross

1 Q. Right. Now, on Page 26, you actually wrote, even if
2 all of these respondents -- excuse me. You reported on
3 Page 26 that the overall rate of respondents that hadn't
4 seen or heard of HQ's brand or company in connection with
5 any services or products was 12.6 percent; right?

6 A. Yes.

7 Q. But based on the answers to your follow-up questions,
8 not the original question, which was similar to the one you
9 asked here, but based on the follow-up questions, you were
10 able to exclude all of those 12.6 percent because they
11 didn't really know what they were -- that they weren't
12 correct when they were identifying HQ; right?

13 A. No, that's not correct they were excluded. It's
14 correct that I recorded the rate that said they recognize
15 it, and then I reported the rate of those who gave follow-up
16 answers that confirmed that what they were thinking of was
17 Regis's co-working service. So I reported both of those
18 percentages, and what I said here is that even if you looked
19 at the larger percentage, it would be a low number.

20 Q. Right. You got your rate from your original
21 question; right? But then, at the bottom of the page on
22 Page 26, you wrote "Regardless, it necessary to consult the
23 subsequent answers to determine the extent to which, if at
24 all, respondents who reported awareness of HQ were actually
25 thinking of Regis's HQ." You wrote that; correct?

Poret - Cross

1 A. Yes.

2 Q. It was necessary to consult those questions that you
3 didn't ask in this case; right?

4 A. Yes.

5 Q. And when you considered the answers to those
6 follow-up questions, the ones you asked in HQ -- in the HQ
7 matter but you didn't ask here, you were able to determine
8 that all 12.6 percent were not actually thinking of the HQ
9 mark even though they had indicated that they affirmatively
10 recognized it; right?

11 A. I believe that is correct, which is not too
12 surprising because 12 percent is a very low number that
13 could be in the range of survey noise. So, that isn't
14 shocking, that a number in the roughly ten percent range
15 would be mostly noise.

16 Q. Mr. Poret, when writing expert reports for
17 litigation, you understand it's important to express all of
18 your opinions in your report; right?

19 A. Yes.

20 Q. And at the time you wrote your opening report, all of
21 the opinions you intended to offer in this matter were
22 contained in your opening report?

23 A. Yes.

24 Q. And in this case, you wrote every word in your expert
25 report; right?

Poret - Cross

1 A. Yes.

2 Q. And I'm not going to go back to these reports unless
3 you feel you need to, but let me just ask you: When we were
4 looking at the Vagisil report, your purpose in conducting a
5 survey in that case was to measure the extent to which the
6 Vagisil mark is famous, if at all, in connection with
7 vaginal care products; right?

8 A. Yes.

9 Q. And in the Vagisil matter, you were retained by the
10 party who was ultimately seeking to prove that the Vagisil
11 mark was, indeed, famous; right?

12 A. Yes.

13 Q. In the REELZ report, you were retained to design and
14 conduct a survey to determine whether the REELZ mark was
15 famous; correct?

16 A. Yes.

17 Q. And you were retained by the party who was attempting
18 to prove that the REELZ mark was not famous; right?

19 A. Yes.

20 Q. And you ultimately offered an opinion that said based
21 on the survey results, it is my opinion that Plaintiff's
22 REELZ mark is not famous; correct?

23 A. Yes.

24 Q. In the Regis report we were just look at, the WeWork
25 report, you were asked to measure the extent to which at all

Poret - Cross

1 Regis's claimed HQ marks are famous within the states of
2 Texas generally or within particular areas of Texas; right?

3 A. Yes.

4 Q. And you were retained by the party who was seeking to
5 prove that the HQ mark was not famous; correct?

6 A. Yep. Yes, correct.

7 Q. You ultimately concluded that Regis's claimed HQ
8 marks are not famous or well known; right?

9 A. Yes.

10 Q. And in the Deere and Company matter that we looked
11 at, you were -- when you were asked about the color scheme,
12 right, you were retained by the party who was seeking to
13 prove that the color scheme was famous as an identifier of
14 Deere; right?

15 A. Yes.

16 Q. You ultimately concluded that the color scheme is
17 famous as an identifier for Deere; right?

18 A. Yes.

19 Q. So, in those cases we all looked at, you offered an
20 opinion as to whether the marks were famous or not famous;
21 right?

22 A. Yes.

23 Q. In this case, however, you have not and are not
24 offering any opinion that the S&P mark is famous; isn't that
25 right?

Poret - Cross

1 A. Yes, that's correct. I'm providing the data, and my
2 opinion is that it was collected reliably, and that number
3 is -- I'm not issuing an ultimate determination on that
4 because I have not seen -- in all those other cases, the
5 numbers were either clearly well above anything that I had
6 seen to be agreed upon to establish fame or well below
7 anything that I had seen to establish fame. And this number
8 is in a range that I have not seen any concrete agreement
9 that says I can definitively classify this. So I'm
10 presenting the result for what it is, and my opinion is that
11 it's a reliable number, but it's for the Court to determine
12 -- to weigh it along with the other evidence.

13 Q. Right. Because in the other cases, the percentages
14 in those cases where you determined that it was famous were
15 high enough that you were able to make the decision and
16 opine that those marks were famous; right?

17 A. It's that they were high enough that I think they
18 were above anything that I've ever seen any court or
19 commentator agree is clearly within the ballpark of fame.
20 Yes.

21 Q. And the percentage in this case does not meet that
22 threshold; correct?

23 A. Well, it's more that I'm not aware of there being a
24 bright-line threshold that lets me classify this number. So
25 I think what's correct is this number is in a range that I

Poret - Cross

1 need to, as a researcher, say, I can't be the one to
2 definitively classify this in the ultimate legal
3 determination. And I -- my opinion is the 67 percent number
4 was collected by a reliable method, and I leave it to the
5 Court to consider and weigh it.

6 Q. And you have not offered and you are not offering any
7 opinion that dilution has occurred in this case; correct?

8 A. That is correct.

9 MR. FINEMAN: All right. Thank you very much
10 for your time today, Mr. Poret. I have no further
11 questions.

12 THE COURT: All right. Any redirect?

13 MS. MILOV: No, Your Honor.

14 THE COURT: All right. May Mr. Poret be
15 excused?

16 MS. MILOV: Yes, Your Honor.

17 THE COURT: Mr. Fineman?

18 MR. FINEMAN: Yes.

19 THE COURT: Okay. Mr. Poret, thank you. Watch
20 your step. You're excused.

21 THE WITNESS: Thank you, Your Honor.

22 THE COURT: All right. So, let's take a break.
23 We'll come back at four o'clock.

24 MR. FINEMAN: Thank you, Your Honor.

25 DEPUTY CLERK: All rise.

1 (Recess was taken.)

2 THE CLERK: All rise.

3 THE COURT: All right. Shall we move onto the
4 next?

5 MS. MILOV: Your Honor, the Plaintiff intends to
6 play excerpts from the deposition of Katherine Roome taken
7 on June 25th, 2021. Ms. Roome was a former in-house counsel
8 at Plaintiff and its successor companies. May I approach
9 with binders of the exhibits --

10 THE COURT: Sure. Yeah.

11 MS. MILOV: -- and excerpts?

12 And before we move on, the rough estimate that
13 we have regarding the run time, the total is 52 minutes, and
14 Plaintiff's designations and replies are about 32 minutes
15 and Defendants' counter-designations are about 20 minutes.

16 THE COURT: Okay.

17 (Start of video.)

18 Q. Good afternoon, Ms. Roome. My name is Jason
19 Rawnsley. I represent the defendants in this litigation, as
20 you just heard. Could you please state your name for the
21 record.

22 A. Katherine Roome.

23 Q. Where are you located this afternoon?

24 A. Cambridge, New York.

25 Q. And do you understand that the testimony you are

1 going to provide today is under oath, same as though you
2 were in court?

3 A. Yes.

4 Q. Switching topics, Ms. Roome. Could you take me
5 briefly through your educational history, starting with any
6 undergraduate degree you may have received?

7 A. I got my bachelor's from Williams College, and I got
8 juris doctor from Cornell University.

9 Q. What did you study at Williams?

10 A. American Civilization.

11 Q. When did you receive your bachelor's degree?

12 A. 1974.

13 Q. And when did you receive your JD from Cornell?

14 A. 1977.

15 Q. After you received your JD from Cornell, did you
16 enter the workforce?

17 A. Yes.

18 Q. What did you do?

19 A. I worked for Chadbourne & Parke, New York City.

20 Q. What's Chadbourne & Parke?

21 A. A law firm.

22 Q. Were you an attorney with Chadbourne & Parke?

23 A. Yes.

24 Q. Did you have a particular practice area?

25 A. Litigation.

1 Q. Is Chadbourne & Parke still in existence, to your
2 knowledge?

3 A. I think so.

4 Q. And how long were you with Chadbourne & Parke?

5 A. Two-and-a-half years.

6 Q. What did you do after you ceased employment with
7 Chadbourne & Parke?

8 A. I went to work for McGraw Hill in-house.

9 Q. When you first joined McGraw Hill, what was your
10 title?

11 A. Assistant general counsel.

12 Q. And just to orient ourselves chronologically, are we
13 at some point in the late 1970s when you joined McGraw Hill?

14 A. 1980.

15 Q. 1980. Thank you.

16 As assistant general counsel with McGraw Hill,
17 what were your responsibilities?

18 A. Many and varied. A lot of intellectual property
19 initially. Everything from a little bit of corporate and
20 real estate, but focused eventually on intellectual property
21 and privacy and some compliance work.

22 Q. During your employment with McGraw Hill, did you ever
23 receive a promotion or a different title?

24 A. Yes.

25 Q. So after you were assistant general counsel, what was

1 your next role with McGraw Hill?

2 A. Vice president associate general counsel.

3 Q. Do you recall when that was roughly?

4 A. 1992 or something, around then.

5 Q. Did your duties change when you became vice president
6 assistant general counsel?

7 A. Well, I had supervision of other lawyers.

8 Q. Did your responsibilities still include intellectual
9 property matters?

10 A. Yes.

11 Q. And how long did you hold that position?

12 A. Until I retired in 20 -- I think January of 2013.

13 Q. During your time with McGraw Hill, did McGraw Hill
14 employ other attorneys who had responsibilities for
15 intellectual property?

16 A. Yes.

17 Q. And did those attorneys report to you?

18 A. A couple of them.

19 Q. During your employment at McGraw Hill, did McGraw
20 Hill have any system in place to monitor the use of other
21 names or phrases for trademark infringement?

22 A. Did McGraw Hill have what?

23 Q. Any system in place to monitor the use of names or
24 phrases by others for potential trademark infringement.

25 A. Did we have a system for it? We had a watch service,

1 yes.

2 Q. Could you tell me what you recall about that watch
3 service.

4 A. It was handled by our outside trademark counsel.

5 Q. And when you refer to "outside trademark counsel,"
6 are you talking about one firm or a number of firms over the
7 years?

8 A. There were -- during my tenure, I think there were --
9 well -- were -- there was more than one trademark counsel,
10 so.

11 Q. Do you recall the names of any of those attorneys?

12 A. Yes, Darby & Darby.

13 Q. Any others that you can recall?

14 A. Well, Proskauer.

15 Q. And other than Darby & Darby and Proskauer, can you
16 recall any other firms that McGraw Hill may have retained
17 for monitoring for trademark infringement?

18 A. I can't recall. There were one or two others. I --
19 I don't recall. Those firms retained counsel in other
20 places sometimes.

21 Q. I have introduced as Exhibit Roome 1 a document
22 bearing the Bates Number P-021504 on the first page.

23 Ms. Roome, please take a moment to look through it, and as a
24 general matter, please look through as much of any of the
25 documents I introduce today as you need to give truthful and

1 accurate responses to my questions.

2 But are you able to tell me what this document
3 is?

4 A. It's correspondence from Darby & Darby addressed to
5 me, and the second page is correspondence addressed to an
6 Andy Baum from another law firm.

7 Q. And was Andrew Baum one of the attorneys that McGraw
8 Hill retained to handle intellectual property matters while
9 you were employed by McGraw Hill?

10 A. Yes.

11 Q. Now, the first page, under the "re" line, it says
12 "S&P Investors Enterprises, Inc." Correct?

13 A. Yes.

14 Q. Okay. And if you will please go down to the second
15 page of the document. It's from a law firm named Ladas &
16 Parry. Do you see that?

17 A. Yes.

18 Q. Do you recall who Ladas & Parry were?

19 A. No.

20 Q. And do you see where Ladas & Parry writes to Mr. Baum
21 and states that "the following company has been incorporated
22 in the above jurisdiction"?

23 A. Yes.

24 Q. And they list the corporate name of the S&P
25 inventors -- strike that. They list the corporate name of

1 the S&P Investors Enterprises, Inc., that we saw on the
2 first page of Exhibit 1; correct?

3 A. Yes.

4 Q. And they note that it's been incorporated in Kentucky
5 in the "re" line; correct?

6 A. It says "McGraw Hill, Inc., trademark S&P in
7 Kentucky." It doesn't say that -- anything about
8 incorporation. Did you --

9 Q. Sure. Well, let me ask you this, Ms. Roome. Does
10 that indicate to you that the corporate entity S&P Investors
11 Enterprises, Inc., was incorporated in Kentucky?

12 A. Oh, I'm sorry. Below there it says so. Yes.

13 Q. Okay. And to the best of your knowledge, was
14 monitoring states for newly incorporated entities a service
15 that Ladas & Parry was performing for McGraw Hill, directly
16 or indirectly, at this time?

17 A. I don't remember the specific name Ladas & Parry, but
18 I know that Darby & Darby used services to monitor
19 trademarks.

20 Q. Okay. And as part of their monitoring of trademarks,
21 they monitored the names of newly incorporated companies;
22 correct?

23 A. Yes.

24 Q. And they monitored every state for newly incorporated
25 companies for potentially infringing trademarks; correct?

1 A. I don't know.

2 Q. Well, they wouldn't have just been monitoring
3 Kentucky; correct?

4 A. I don't -- I wouldn't think so.

5 Q. You would expect them to be monitoring nationwide;
6 correct?

7 A. I would expect so.

8 Q. And during your employment with McGraw Hill, to the
9 best of your recollection, did McGraw Hill continue to
10 retain the services of firms to monitor the names of newly
11 incorporated companies?

12 A. Yes.

13 Q. And you left McGraw Hill in 2013?

14 A. I think the beginning of 2013.

15 Q. Do you have any recollection of a dispute between
16 McGraw Hill and an entity or entities over the use of the
17 name S&P Data?

18 A. S&P Data specifically?

19 Q. Of the use of the name S&P Data or involving a
20 company named S&P Data?

21 A. Not beyond the documents which I saw during
22 preparation for this.

23 Q. Okay. So other than the documents you saw, you don't
24 have any recollection of a dispute McGraw Hill may have had
25 regarding the use of the name S&P Data; correct?

1 A. No.

2 Q. And is that because of the passage of time between
3 when you would have been addressing it and the current date?

4 A. Yes.

5 Q. Okay. Val, could you please introduce Tab 2.

6 So, Ms. Roome, I'm going to be introducing
7 another document which should show up as Exhibit 2 shortly
8 in your folder. Just please let me know when you have it.

9 A. I have it.

10 Q. Okay. So I have introduced as Exhibit Roome 2 a
11 document bearing the Bates Number P-019755 in the lower
12 right-hand corner of the first page.

13 Ms. Roome, do you recognize this document?

14 A. I don't remember it.

15 Q. Do you recognize it as a document that you would have
16 either sent or received in the course of your
17 responsibilities at McGraw Hill?

18 A. It appears to be so.

19 Q. Okay. That you know.

20 And you see at the top where it says "legal" and
21 then there's an ID number with what appears to be a phone
22 number?

23 A. ID number. I see a fax number. I'm sorry. Where
24 are you?

25 Q. Sure.

1 A. Oh, at the top. I'm sorry. Yes, correct. Yes.

2 Q. Okay. And this is -- well, the first page is a
3 letter from the law firm Smart & Biggar directed to Amanda
4 Laura Nye of Darby & Darby. Do you know who Smart & Biggar
5 were, Ms. Roome?

6 A. I saw this letterhead in preparing for this
7 deposition, and I believe it was a firm retained by Darby &
8 Darby.

9 Q. Okay. And other than seeing the letterhead on this
10 document, do you have any independent recollection of the
11 retention of Smart & Biggar by McGraw Hill?

12 A. The name is vaguely familiar.

13 Q. So, if you could please scroll down to the third page
14 of this document, the P number is 15474.

15 A. Yes.

16 Q. Okay. And this is a letter from Smart & Biggar to
17 McMillan Binch. Do you know what McMillan Binch was,
18 Ms. Roome?

19 A. No.

20 Q. And it says, "Attention: Ms. Alice Ann Morlock." Is
21 that name familiar to you, Ms. Roome?

22 A. No.

23 Q. Under the "re" line, it references possible
24 oppositions against Canadian trademark applications. Do you
25 see that?

1 A. Yes.

2 Q. And do you see that there are three serial numbers
3 listed?

4 A. Yes.

5 Q. And do you understand those to be serial numbers that
6 correspond to Canadian trademark applications?

7 A. Yes.

8 Q. So introducing as Exhibit 6 a document bearing the
9 Bates SANDPDATA0026118, Ms. Roome, I'll represent to you
10 that this is a document from the website of the Canadian
11 Trademark Office.

12 And my first question is: Do you see the
13 application number there, 0811099?

14 A. Yes.

15 Q. Could you go back to Exhibit 5 for a moment, please.

16 A. Yes.

17 Q. And that's the same number as the serial number in
18 the "re" line of this letter to Ms. Nye on the first page,
19 811099; correct?"

20 A. Yes.

21 Q. Thank you. And, again, if we go down to the third
22 page from Smart & Biggar to Ms. Morlock, we, again, see the
23 serial Number 811099; correct?

24 A. Yes.

25 Q. Do you understand that this -- going back to

1 Exhibit 6 -- do you understand that this refers to
2 information regarding the trademark applications listed in
3 Exhibit 5?

4 A. I assume so.

5 Q. Okay. That should suffice. So let's go back to
6 Exhibit 5 for a moment. Please let me know when you are
7 there.

8 A. I am there.

9 Q. But if you're -- oh, okay. Sorry about that. So we
10 just looked at serial number 811099. On the first page in
11 the "re" line and on the third page of Exhibit 5, do you see
12 a serial number 811100?

13 A. Yes, I do.

14 Q. Okay. Could we introduce Exhibit 7, please.

15 A. Okay. I have it.

16 Q. Okay. So Exhibit 7, Exhibit Roome 7 is Bates Number
17 SANDPDATA0026120. Ms. Roome, I will represent to you again
18 that this is a document pulled from the website of the
19 Canadian Trademark Office.

20 And do you see that the application number bears
21 the same 811100 that we just looked at as the serial number
22 81111 in Exhibit 5?

23 A. Yes.

24 Q. And then if you could look close to the top, I think
25 about a third of the way down, there is a description of

1 "services" again.

2 A. Yes.

3 Q. Okay. And to the best of your recollection, do -- do
4 you understand that description of services to be the same
5 as that we looked at in Exhibit 3 and in Exhibit 6?

6 A. Yes, it appears to be the same.

7 Q. Okay. And do you understand this -- you know,
8 granted that it's not a document that was produced by you --
9 to contain information about the trademark application
10 811100?

11 A. Yes.

12 Q. Could you introduce Exhibit 8, please, Val.

13 Okay. And you see an application number at the
14 top of this document, 811101?

15 A. Yes, I do.

16 Q. Okay. And you understand that to be an application
17 number for a trademark application?

18 A. I assume so. Yes, it says so on the left. Yes.

19 Q. Is -- and just to wrap up this line of questioning,
20 the 811101 number we just saw has a corresponding serial
21 Number 811101 in the "re" line of the first and third pages
22 of Exhibit 5; correct?

23 A. Yes.

24 Q. Okay. Exhibit Roome 9 has a Bates number of
25 P-007434. It appears to be a letter from Ms. Amanda Laura

1 Nye directed to Ms. Alice Ann Morlock. Ms. Roome, do you
2 recognize this letter?

3 A. I haven't -- I don't remember it, no.

4 Q. Okay. I believe you testified earlier that Ms. Nye
5 was an attorney with the law firm of Darby & Darby?

6 A. Yes.

7 Q. Now, this letter isn't signed; correct?

8 A. Not on what I'm looking at.

9 Q. Okay. And there's no stamp on it indicating that it
10 was received in any particular location; correct?

11 A. I don't see a stamp.

12 Q. Okay. There's no printing indicating that this was a
13 fax transmission anywhere on it; correct?

14 A. No.

15 Q. And there's not a header for Darby & Darby with the
16 logo like we saw in one of the earlier exhibits; correct?

17 A. No.

18 Q. Ms. Roome, do you know one way or another whether
19 this letter was ever sent?

20 A. I assume it was.

21 Q. Why do you assume that?

22 A. I don't see -- it says -- we are on 9; right? It
23 just disappeared.

24 Q. We are still on Exhibit 9.

25 A. Yeah. Well, I don't know whether there was a cover

1 sheet on this or not.

2 Q. Right. So there's nothing like a cover sheet to
3 indicate that this was sent; correct?

4 A. Right.

5 Q. Okay. Am --

6 A. Sometimes --

7 Q. Now, I'm sorry. Please go ahead. My apologies.

8 A. Letters aren't always signed when they go into the
9 file, even if they've been sent.

10 Q. Okay. And this lacks the logo of Darby & Darby;
11 correct?

12 A. That is correct. Well, it says Amanda Nye.

13 Q. It contains her information, but it doesn't contain
14 the logo that we saw in previous letters from Darby & Darby;
15 correct?

16 A. It doesn't say Darby & Darby, except in the website
17 address.

18 Q. Darbylaw.com; correct?

19 A. Yeah.

20 Q. So, let me ask again. Is there anything on this
21 document in particular that indicates to you that this was
22 actually sent to Ms. Morlock?

23 A. No, I can't say.

24 Q. Okay. Thank you.

25 Now, the substance of this letter refers to a

1 draft proposed settlement agreement. Could you take a
2 moment to read the text and let me know if you see that?

3 A. Yes. Yes.

4 Q. Okay. Do you recall ever seeing a draft settlement
5 agreement proposed by S&P Data?

6 A. I don't recall.

7 Q. Okay. We are done with that.

8 So I've introduced Exhibit Roome 10. It bears
9 the Bates P-006928. Ms. Roome, do you recognize this
10 document?

11 A. I may have seen this. I may have seen this during
12 preparation for this deposition.

13 Q. Okay. And at the bottom of this document, do you see
14 where you are indicated as a copy recipient?

15 A. Yes.

16 Q. And there's no header or logo for the Darby & Darby
17 firm on this; correct?

18 A. Well, it says Amanda Nye, attorney at law. It has
19 her phone number and its web -- the website.

20 Q. Does the full name of the firm appear anywhere in
21 this?

22 A. No, I don't see the name Darby & Darby.

23 Q. Does a logo for Darby & Darby appear anywhere on this
24 exhibit?

25 A. No, but when things were sent by telecopier in 2000,

1 that may have been the way it was done.

2 Q. Do you know that one way or another, Ms. Roome, are
3 or you speculating?

4 A. I don't know for certain.

5 Q. Okay. So Exhibit 11 bears the Bates P-006929.

6 Ms. Roome, do you see, once again, that you are indicated as
7 a copy recipient via telecopier?

8 A. Yes.

9 Q. And we don't see any printing on the top or the
10 bottom of these pages indicating transmission by fax
11 machine; correct?

12 A. We don't -- we don't see the separate confirmation
13 page.

14 Q. Okay. And we don't see any printing at the top
15 indicating a phone number or any other identifying
16 information such as we saw in an earlier exhibit; correct?

17 A. No, this could be a file copy.

18 Q. Okay. And Ms. Nye doesn't sign this letter, does
19 she?

20 A. No.

21 Q. And this, again, does not contain any info about the
22 Darby & Darby law firm other than Ms. Nye's name, phone
23 number, and email address in the top right-hand corner of
24 the first page; correct?

25 A. Yeah, that's -- yeah, that's the letterhead.

1 Q. Okay. Ms. Nye, can you say one day -- my apologies,
2 strike that. Ms. Roome, can you say one way or another
3 whether this document was ever sent to Ms. Morlock?

4 A. I can't say for certain, but it could have been a
5 file copy.

6 Q. Okay. But you are speculating it could have been a
7 file copy; correct?

8 A. I don't know for certain.

9 Q. Okay. You don't have a specific recollection that
10 this was a file copy; correct?

11 A. No.

12 Q. Okay. Now, the second full paragraph it states "We
13 are less than pleased, however, that your client is now
14 unwilling to reach a written agreement whereby your client
15 would agree not to use or register S&P Data or any
16 confusingly similar mark for services related to those our
17 client offers under S&P."

18 A. I see that.

19 Q. Okay. It doesn't say that S&P Data has to stop using
20 the name S&P Data; correct?

21 A. Ask that again? What?

22 Q. Sure.

23 A. We will -- are less than pleased your client is
24 unwilling to reach a written agreement. So your question
25 is?

1 Q. It's not referencing an agreement not to use S&P
2 Data; correct?

3 A. No, because there isn't -- it says "now unwilling to
4 reach a written agreement."

5 Q. Okay. And the term of that written agreement isn't
6 an agreement not to use S&P Data. It's an agreement not to
7 use S&P Data for services related to those that our client
8 offers under S&P; correct?

9 A. Services related to those our -- it says that they --
10 there's not going to be a written agreement whereby this
11 company agrees not to use a confusingly similar mark for
12 services related to those offered by S&P, my former
13 employer.

14 Q. Correct. So is it your understanding that the author
15 of this letter was asking S&P Data to enter into an
16 agreement that it would not use S&P Data or any confusingly
17 similar mark for services related to those that your former
18 employer offered under S&P; correct?

19 A. Yes.

20 Q. So the term would be that S&P Data could still use
21 the name provided that they did not do so for services
22 related to those that your former employer offered under
23 S&P; correct?

24 A. Yes, but there's no indication here of what services
25 my former employer offers under that name.

1 Q. That is correct. There's not, is there?

2 A. Not -- not enumerated in this letter.

3 Q. Okay. And we saw earlier the proposal for the
4 settlement agreement was that S&P Data could use the name
5 provided it stayed within the services described in its
6 trademark applications; correct?

7 A. I'm sorry. I don't -- you are referring to where?

8 Q. Do you recall earlier when we looked at the
9 identification of services in the trademark applications?

10 A. I remember when we looked at identification of
11 services, yes.

12 Q. Okay. And do you remember we looked at an earlier
13 settlement proposal made on behalf of your client that S&P
14 Data could use the name provided it stayed within those
15 services identified in its trademark application?

16 A. Let me go back and look at that.

17 Q. Okay. Are you having difficulty remembering that?

18 A. Yeah.

19 Q. Okay.

20 A. If I had all the documents in front of me, it would
21 be easier.

22 Q. No, I understand. Okay. So I will read to you from
23 Exhibit 5.

24 A. Okay. I will go back to 5.

25 Q. Okay. Go back to 5.

1 A. This was the Smart & Biggar.

2 Q. Sure. Go to the very bottom page.

3 A. Yeah. Oh, I see. Additionally, beyond the services
4 three existing (reading to self under her breath). I'm
5 sorry, but not having all the documents in front of me with
6 the chronology, this is hard for me to piece together --

7 Q. I appreciate that.

8 A. -- which letter came before which document.

9 Q. I appreciate that.

10 A. Yeah, this is -- I mean, I'm not taking any notes,
11 but this is July 1997. And then Exhibit 10, I don't know
12 what the date of that was, so.

13 Q. Right. And it's hard to remember these details
14 because they were decades ago; correct?

15 A. They were decades ago.

16 Q. So just briefly on Exhibit 5, I just wanted to remind
17 you of the settlement terms initially proposed by your
18 client on the last page of Exhibit 5. Do you remember when
19 we looked at Item 2?

20 A. You said this is initially. I don't know if this was
21 initially or subsequently or when.

22 Q. Okay. And that's because you can't recall the
23 details of what happened all that long ago; correct?

24 A. Yeah.

25 Q. If you had additional documents in this

1 correspondence, could that potentially help you to
2 understand the context of these agreements?

3 A. Possibly.

4 Q. Do you have any reason to think there were more
5 documents relating to this matter?

6 A. I have no recollection.

7 Q. So, Ms. Roome, after June 12, 2000, do you have any
8 recollection of any steps taken by McGraw Hill to monitor
9 S&P Data or any of its affiliates or subsidiaries or
10 successive companies for the use of the name S&P Data?

11 A. I have no direct recollection.

12 Q. Okay. And do you ever recall having seen an executed
13 settlement agreement between your employer, McGraw Hill, or
14 any of its affiliates and anyone on behalf of S&P Data?

15 A. The client you're representing. I have no
16 recollection.

17 Q. Well, any client that goes under the name -- any
18 company that goes under the name S&P Data.

19 A. I have no recollection.

20 Q. Okay. Did you ever speak directly with anyone at S&P
21 Data on behalf of your employer regarding the matters we've
22 looked at today?

23 A. I have no recollection.

24 Q. Do you know whether anyone on your behalf spoke
25 directly with anyone at S&P Data regarding the matters we've

1 discussed today?

2 A. I have no recollection.

3 Q. Okay. What about -- well, do you know whether anyone
4 at McGraw Hill ever spoke directly with anyone at a company
5 named International Data Response regarding the subject
6 matter of the documents we've looked at today?

7 A. I have no recollection.

8 Q. Do you know whether anyone at McGraw Hill ever spoke
9 directly with anyone at a company named Telespectrum
10 regarding the subject matter of the documents we've looked
11 at today?

12 A. I have no recollection.

13 Q. Is it fair to say you don't know who at S&P Data may
14 have been aware of the subject matter of the documents we've
15 seen today?

16 A. No, I don't know.

17 Q. And you don't know who at Telespectrum may have been
18 aware of the subject matter of the documents we've seen
19 today?

20 A. Not based -- no, I don't.

21 Q. Okay. And you don't know who at a company named
22 International Data Response may have been aware of the
23 subject matter of the documents we have seen today?

24 A. No, I don't know.

25 Q. Have you ever spoken with a man named Dan Plashkes?

1 A. Not to my recollection.

2 Q. Do you know whether anyone at McGraw Hill ever spoke
3 with a man named Dan Plashkes regarding these trademark
4 matters we have discussed today?

5 A. I don't know.

6 Q. Do you know whether anyone on behalf of McGraw Hill
7 ever spoke with a man named Dan Plashkes regarding the
8 subject matter of the documents we've seen today?

9 A. I don't know.

10 Q. Did you ever speak with a man named David Borts
11 regarding the subject matter of the exhibits we've seen
12 today?

13 A. I don't know.

14 Q. Do you know whether anyone at McGraw Hill ever spoke
15 with anyone named David Borts regarding the subject matter
16 of the exhibits we've seen today?

17 A. I don't know.

18 Q. Do you know whether anyone acting on behalf of McGraw
19 Hill ever spoke with a man named David Borts regarding the
20 subject matter of the exhibits we've seen today?

21 A. I don't know.

22 Q. Okay. And just looking quickly at Exhibit 11. It's
23 directed to a Ms. Alice Anne Morlock of McMillan Binch. Do
24 you see that?

25 A. Yes.

1 Q. Do you know who Ms. Morlock may have been speaking
2 with at her client regarding these trademark oppositions?

3 A. No, I don't know.

4 Q. After 2000 up until the time you left McGraw Hill, do
5 you recall any other matters involving an entity named S&P
6 Data or the use of the name S&P Data?

7 A. No, I don't.

8 Q. Okay. When you left McGraw Hill, who among its
9 in-house counsel was responsible for intellectual property
10 matters?

11 A. When I left, I think it was Susan Winter.

12 Q. Okay. And when you left, did you transfer your files
13 to Ms. Winter regarding intellectual property matters?

14 A. I think I did well before that.

15 Q. Okay. Do you know whether you provided Ms. Winter
16 with documents regarding the Canadian trademark opposition
17 that we've looked at today?

18 A. Well, they would have been in the file room. So they
19 were available to the attorneys in the department.

20 Q. Ms. Roome, I'm going to ask you to -- put in front of
21 you Exhibit 5, if you can just click on that.

22 A. I got it.

23 Q. And let me just direct you to the last page of the
24 document, P-15475. Do you have that?

25 A. Yes, I do.

1 Q. And if you look down about midway down the page, it
2 says, "Our client would be willing to settle these
3 opposition disputes along the broad parameters as follows."
4 Is it correct that what's being set forth there is a
5 settlement proposal?

6 A. Well, it's along the broad parameters.

7 Q. Correct. It's the broad parameters for potential
8 settlement; correct?

9 A. That's how I understand it.

10 Q. And in order to complete that settlement, you would
11 need to come to an agreement; correct?

12 A. Correct.

13 Q. Are you aware of any agreement ever being reached to
14 settle the matter?

15 A. I don't recall.

16 Q. And we haven't seen any documents that reflected any
17 final settlement agreement; correct?

18 A. I haven't seen anything in preparing for this.

19 Q. And you weren't shown anything by Mr. Rawnsley today
20 that reflected any settlement agreement; correct?

21 A. Correct.

22 Q. Now, if you look at the sentence, it says, "Our
23 client would be willing to settle these opposition
24 disputes." These opposition disputes that we're talking
25 about are in Canada; correct?

1 A. That's my understanding.

2 Q. With respect to Canadian trademark applications;
3 correct?

4 A. That's my understanding.

5 Q. Do you have any understanding, one way or another, as
6 to whether this settlement proposal would have extended to
7 the United States?

8 A. It seems to appear to these opposition disputes
9 involving the applications referenced at the top of the
10 letter.

11 Q. All of which are Canadian applications. Correct?

12 A. That's what it says.

13 Q. Now, let's look at Exhibit 9.

14 A. Exhibit 9.

15 Q. If you can just pull it up, it's a March 8th, 2000,
16 letter. Do you have that?

17 A. Yes.

18 Q. And in this document, Ms. Nye writes in the end of
19 the second paragraph, "In the mean time, please give your
20 consent to further three-month extension of the currently
21 outstanding deadlines of March 19th, March 26th, and
22 April 12, 2000." Do you understand that to be a request for
23 a consent of the time to oppose?

24 What's your understanding of what's being
25 referenced there?

1 A. Possible Canadian Opposition is the heading.

2 Q. And based on that, how would you understand a request
3 to -- for consent to further extensions?

4 A. I would understand the extensions to be referring to
5 the Canadian opposition.

6 Q. Let's pull up Exhibit 6, if we can. Now, if you
7 look, this is a document that Mr. Rawnsley showed you that
8 he represented came from the Canadian Trademark Office. Do
9 you recall that?

10 A. Yes.

11 Q. And if you look at the second page of Exhibit 6, do
12 you see down underneath "statement of opposition" there's
13 various references to extensions of the time being granted?

14 A. Opposition -- opposition history? Yes.

15 Q. Yeah, can you see there's a number of extensions of
16 the time being granted to the opponent?

17 A. Yes.

18 Q. And for the last six of them, do you also see there's
19 a reference that says "with consent"?

20 A. Yes.

21 Q. And would that, to your understanding, indicate that
22 the extensions of time had been consented to by the
23 applicant?

24 A. Yes.

25 Q. Now, if you look at the next to last one of those

1 extensions, it's dated March 10, 2000. Correct?

2 A. Yes.

3 Q. And it says "with consent extension time granted to
4 opponent" and then has the action date as March 10, 2000;
5 correct?

6 A. Yes.

7 Q. And if you look back at Exhibit 9, that letter was
8 dated March 8, 2000. That's two days before the entry that
9 we just looked at; correct?

10 A. Yes.

11 Q. And in that letter, Ms. Nye is requesting consents
12 for an extension; correct?

13 A. Yes.

14 Q. And then if we look at Exhibit 6, according to the
15 Canadian Trademark Office records, it appears that consent
16 was granted two days later on March 10th; correct?

17 A. Well, I'm looking. With consent extension of time
18 granted March 10th, yes.

19 Q. Let me rephrase. We've looked at a request on
20 March 8, 2000, in Exhibit 9 for an extension. And we have
21 seen in the Canadian Trademark Office records on Exhibit 6,
22 two days later, it's indicated extension of time granted
23 with consent. Based on that, can you draw any conclusion on
24 whether or not it's likely that Exhibit 9 was actually
25 essential?

1 A. It appears to be, yes.

2 Q. Now, let's look at Exhibit 7. Exhibit 7 is a
3 Canadian Trademark Office record with respect to another of
4 the S&P Data applications; correct?

5 A. Yes.

6 Q. And if you look at the second page of that exhibit,
7 that also contains a number of extensions of time over a
8 period of years from 1997 out to 2000; is that right?

9 A. Yes.

10 Q. And would that indicate to you anything about how
11 long the matter continued to be in discussion between the
12 parties?

13 A. It looks like in 2000 there's an extension of time
14 granted to opponent.

15 Q. That's the last time you see one; right?

16 A. That's last time. It says deadline to file -- yeah,
17 I don't know what that means. Deadline to file.

18 Q. Well --

19 A. But it looks like a consent to extend the time to the
20 opponent was last done on this document in 2000.

21 Q. The last deadline that is shown to file is May 19,
22 2000; correct?

23 A. May 19, yes.

24 Q. And if you look further up in the exhibit on the
25 first page under "action history," do you see the last entry

1 says "withdrawn by owner" May 29, 2000?

2 A. With "withdrawn by owner" May 29, 2000. I see that.

3 Q. And what would you understand that to be a reference
4 to?

5 A. That the owner of the application had withdrawn the
6 application.

7 Q. And if you look up higher in the document under "C
8 IPO status," do you see that on the left-hand side? It also
9 says under there "withdrawn by owner." Correct?

10 A. Correct. It says "withdrawn by owner."

11 Q. And underneath that it says
12 "dead/application/withdrawn/abandoned"; correct?

13 A. Yes, I see that.

14 Q. So based on all of that, what conclusions can you
15 draw about what happened with respect to these S&P Data
16 applications?

17 A. It appears that the applications were withdrawn or
18 abandoned.

19 Q. And let's look at Exhibit 10 for a moment. That's a
20 May 17, 2000, letter that was marked previously; correct?

21 A. Yes.

22 Q. And in the first paragraph it says "Further to our
23 telephone conversation this morning and my voicemail message
24 shortly thereafter, I'm enclosing a draft settlement
25 agreement." Do you have any reason to understand why

1 Ms. Nye would be referring to a telephone conversation if
2 she hadn't spoken to Ms. Morlock?"

3 A. No.

4 Q. And if you read on in the exhibit, it says, "The
5 agreement now reflects that the various S&P Data
6 applications have been abandoned, as you advised me this
7 morning that you expected to file notices of abandonment
8 today."

9 Do you know of any reason why Ms. Nye would
10 prepare a letter indicating that the applicant was planning
11 to abandon the applications if she hadn't been advised of
12 that?

13 A. No.

14 Q. And in fact, from the trademark records that we've
15 looked at, we see that 12 days later, applications to --
16 abandonments were actually filed with respect to those
17 applications; correct?

18 A. Yes.

19 Q. Now, let's look at Exhibit 11. This is a June 12,
20 2000, letter, again from Ms. Nye. And in the first sentence
21 it says, "Our Canadian attorney received his copies of
22 abandonments of the various S&P Data applications filed by
23 your client, formerly known as S&P Data Corp." Are you
24 aware of any reason why Ms. Nye would prepare a letter
25 indicating that she had received copies of abandonments if

1 she hadn't received them?

2 You can answer.

3 A. No.

4 Q. And as of June 12, 2000, the Canadian trademark
5 records that we've seen indicate that abandonments had been
6 filed; correct?

7 A. Yes.

8 Q. Do you recall that Mr. Rawnsley asked you questions
9 about whether the agreement that's been referenced would
10 have prevented S&P Data from using its mark?

11 A. Yes.

12 Q. He didn't read you the next sentence, which says,
13 "Accordingly, we take this opportunity to confirm that you
14 have represented to us that your client is not currently
15 using S&P Data or any of the other S&P variations which were
16 the subject of these requests for extension of time." Do
17 you have any reason to know why Ms. Nye would indicate that
18 such a representation had been made if it hadn't been made?

19 A. No.

20 Q. And the last sentence when Ms. Nye asks about -- or
21 indicates that there's been a representation that the client
22 is not currently using S&P Data, that's not limited to any
23 particular services, is it?

24 A. No.

25 Q. In Exhibit 11, it says, "As for future use, you have

1 told us that your client has no intention to use S&P or S&P
2 Data in the future, given the merger of the parent company
3 into Telespectrum, with the surviving company name being
4 Telespectrum." Do you have any knowledge as to why Ms. Nye
5 would make that statement if that hadn't been represented to
6 her?

7 A. No.

8 Q. First of all, Ms. Roome, you haven't been shown today
9 any correspondence directed to McGraw Hill or its counsel
10 from anyone on behalf of S&P Data; correct?

11 A. I don't recollect any today.

12 Q. Do you recall at any point having seen a
13 communication directed to McGraw Hill or its counsel from
14 someone on behalf of S&P Data at any time?

15 A. No, I don't recollect.

16 Q. If there had been such communications to McGraw Hill
17 or its counsel in the course of your duties, do you expect
18 that those communications would have come to your attention?

19 A. If they pertained to this trademark matter?

20 Q. Correct.

21 A. Yes.

22 Q. And they would have gone into the file; correct?

23 A. That would be typical.

24 Q. Are you aware of the practices of Darby & Darby with
25 regard to its preparation of drafts?

1 A. Not specifically.

2 Q. Are you aware generally?

3 A. Usually, it would say "draft" if it were a draft.

4 Q. Did you ever work for Darby & Darby?

5 A. No.

6 Q. Do you know whether they had any policies for
7 requiring things to be labeled "draft" if they were drafts?

8 A. No, I wouldn't know. But I have seen drafts -- I
9 have -- I don't recall specifically, but usually, if an
10 outside attorney sent me a draft letter, it would be marked
11 "draft."

12 Q. Okay. And you don't recall that with regards to the
13 practices of Darby & Darby; correct?

14 A. Not specifically.

15 Q. Correct. That was one of my questions. And I will
16 go back again. Do you see anything on this document in
17 particular that indicates that this document, regardless of
18 what the subject matter of it may say, but that this
19 document in particular was actually sent to Ms. Morlock?

20 A. It appears to have been.

21 Q. What indicates that to you?

22 A. It has the letterhead on it. It has the "via
23 telecopier." It doesn't say "draft" anywhere.

24 Q. Okay. And it doesn't have a fax transmission;
25 correct?

1 A. No, it does not have that little header thing at the
2 top.

3 Q. And we saw that earlier on other fax transmissions;
4 correct?

5 A. We did on some of the documents you showed me.

6 Q. And this says it was intended to be via telecopier;
7 correct?

8 A. This says "via telecopier."

9 Q. And that's a fax machine; correct, Ms. Roome?

10 A. Yes.

11 Q. Okay. And, Ms. Roome, other than the fact that this
12 is set up in a letter format, is there anything about
13 Exhibit 10 that indicates to you that this document in
14 particular was sent to Ms. Morlock by Ms. Nye?

15 A. I assume it was. I don't know why it would have been
16 prepared. It doesn't carry a draft notice. It says that it
17 was cc'd and sent to me. I don't know why it would be in
18 her file unless it was sent.

19 Q. And we haven't seen a copy indicating a fax
20 transmission with information at the top; correct?

21 A. No, we -- I haven't.

22 Q. You have not, correct. And you haven't seen a copy
23 with a fax cover letter; correct?

24 A. I haven't.

25 Q. Okay. And if you had received a copy with that

1 information, would that have been maintained in McGraw
2 Hill's files?

3 A. Typically.

4 Q. Okay. Let's go to Exhibit 11, Ms. Roome. Now, this
5 one you are indicated as a copy recipient via telecopier;
6 correct?

7 A. Yes.

8 Q. And we don't see anything printed at the top or the
9 bottom of these pages indicating a fax transmission.
10 Correct?

11 A. We don't see it on this.

12 Q. Okay. And you haven't been shown any fax cover
13 letter for this; correct?

14 A. I don't believe so.

15 Q. And you have no recollection of ever having seen one;
16 correct?

17 A. I don't believe so.

18 Q. Do you have any recollection whatsoever of having
19 seen this letter before it may have been shown to you by
20 your counsel or by myself today?

21 A. No.

22 Q. And Mr. Mandel directed you to some subsequent
23 paragraphs here, and it says, "You have told us that your
24 client has no intention to use S&P or S&P Data in the future
25 given the merger of parent company into Telespectrum."

1 Correct?

2 A. Yes, that's what it says.

3 Q. And it could be that they did not want to use the
4 Telespectrum -- strike that. It's a possibility that
5 Telespectrum had no intention to use S&P Data going forward
6 because of the merger; correct?

7 A. I -- that -- Amanda seems to be assuming that. But
8 she is assuming, given the merger that -- you have told us
9 your client has no intention, given the merger, to use the
10 name.

11 Q. Correct. Because it's being merged away into a
12 company named Telespectrum; correct?

13 A. Yes.

14 (Conclusion of video.)

15 MS. MILOV: Your Honor, as a housekeeping
16 matter, after that, I wanted to offer into evidence
17 Plaintiffs' Exhibits 53, 76, 13, 14, 15, 77, 16 and 17,
18 which were presented during that video deposition excerpt.

19 MR. RAWNSLEY: No objection, Your Honor.

20 THE COURT: All right. Admitted without
21 objection.

22 (PTX Exhibit Nos. 53, 76, 13, 14, 15, 77, 16,
23 and 17 were admitted into evidence.)

24 MS. MILOV: And, Your Honor, I am mindful of the
25 time. We're about six minutes before 5:00 p.m. The next

1 deposition excerpt video we have is about 21 minutes, so I
2 wasn't sure if you wanted to pick up in the morning.

3 THE COURT: All right. Well, why don't we pick
4 up in the morning. We'll start at five minutes of 9:00 so
5 that we can get this thing done.

6 Okay. Anything else before we break for the
7 day?

8 MR. FINEMAN: Nothing from our side, Your Honor.

9 MS. MILOV: Nothing from Plaintiffs.

10 THE COURT: All right. Well, have a good
11 evening. I'll see you all tomorrow.

12 MS. MILOV: Thank you.

13 MR. FINEMAN: Thank you, Your Honor.

14 DEPUTY CLERK: All rise.

15 (Court was recessed at 4:55 p.m.)

16 I hereby certify the foregoing is a true and
17 accurate transcript from my stenographic notes in the
18 proceeding.

19 /s/ Heather M. Triozzi
20 Certified Merit and Real-Time Reporter
21 U.S. District Court
22
23
24
25